

# Chapter 9

## Methods of Ascertainment of Personal Damage in Belgium

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**Abstract** This chapter illustrates the historical, judicial, and juridical framework of personal injury assessment and compensation in Belgium, describing the expert's qualification and competences and detailing the ascertainment methodology and criteria of evaluation utilized for identifying, describing, and estimating any personal injury, its temporary and permanent consequences, and the causal value/link between the event and the injury and between the injury and the impairment/disability.

### 9.1 Historical, Judicial, and Juridical Overview

#### 9.1.1 History

The first known laws to compensate for damage were issued by Hammurabi in 1725 BC. They were comprised of very cruel punishments such as “an eye for an eye and a tooth for a tooth” and also pecuniary punishments.

In the Middle Ages the Kings made the Laws and different Courts were established to Judge the wrongdoers. Torture was a common method to prove whether somebody was innocent or not.

Modern times began with the Code of Napoleon in 1804. This was adopted in several Countries, including Belgium, which was ruled by the French from 1794 to 1815, when Napoleon lost his last battle in Waterloo.

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This Napoleonic code, despite having been amended over time, is the basis of our Civil legislation. The articles (1382–1386) about the necessity for the compensation of human damage are still the same as in 1804.

The Industrial Revolution of the nineteenth century resulted in a shift from agriculture to industry and those employed in the factories had none or limited rights. Accidents at work were not compensated and drove workers and their families into big financial problems. A major accident in the mining industry in 1813 led to an Imperial decree financed by the employers and the miners, who could forthwith benefit from pensions and pecuniary compensation for disability. More and more trade unions were established and in 1903 the First Law for accidents at work was issued. By 1945 all employees were included.

The Belgian Social Security System was built up and included health care (through sick Funds), pensions, financial provisions for disabled and unemployed persons, and compensation for diseases caused by working in a particular profession. This guaranteed at least a minimum income for those who were damaged by health problems.

In 1971 a law was issued making insurance for accidents at work compulsory and included also accidents occurring to and from work in the same Law.

In 1975 the Official Scale of Disability was issued by Royal decree based on the Laws of October 1948 where the reparation of physical damage of soldiers, political prisoners, and members of the resistance was laid down in percentages of impairment. This Scale is *still* used in Belgium for the evaluation of physical disability.

The popularity of insurance has led to a better legal protection for the individual person, providing the assistance of lawyers and medical experts if claims for compensation of physical damage are made. We see an essential increase of claims for sustained physical damage. Many of them are settled out of court, but the number of Court cases is still growing.

In 2004 the First Indicative Table (IT) with a list of all possible damages was assembled by the police courts. That Table was adapted and changed over the years. The latest is the IT of 2012.<sup>1</sup> The aim of the IT is to make sure that the victim will get a more precise and equitable compensation for the damages sustained.

### **9.1.2 Legal Basis of Liability**

The main articles relating to Civil liability are the articles 1382–1386 of the Belgian Civil Code.

Every human being who commits a tortious act causing damage to another person has the obligation to compensate this damage (1382), not only because of his/her actions, but also because he/she was negligent or imprudent (1383).

Persons who are responsible for others (parents for their minor children, teachers for their pupils, principals for their subordinates or servants) can be held liable for

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<sup>1</sup> [http://www.fcgb-bgwf.be/documents/Tabl\\_Ind\\_2012\\_Fr.pdf](http://www.fcgb-bgwf.be/documents/Tabl_Ind_2012_Fr.pdf).

errors of those under their authority, unless they can demonstrate that they could not have prevented the act (1384).

Additionally, the owners of animals and buildings will be liable if some damage results from it (1385).

Finally, there is a specific article for the liability of persons in a state of insanity (1386).

To be liable evidence must be supplied that a fault, causing damage, has been committed and that there is a causal link between the fault and the damage. This evidence must be provided by the victim.

## 9.2 The Fault Principle

What is a fault? The criterion is the “*culpa levis in abstracto*” principle. In civil liability the lightest error and in contractual liability the light error is sufficient, but the distinction between light and lightest is difficult to make. It is the task of the court to consider that an error has been made based on the evidence and documents of the case. The Judge will compare the behavior of the perpetrator with the “careful and prudent person under the same circumstances of time and place” [1]. This standard of care is measured through objective and external and impersonal criteria. It does not take into account subjective data such as age, sex, intelligence, and character.

## 9.3 Causal Link and Equivalence Theory

A causal connection exists when it can be proved that, in the absence of the error, the damage would not have occurred as it happened in reality [2]. The damage must not necessarily be a direct consequence of the fault. It is sufficient that there is a relationship between the error and the injury. The burden of proof of the existence of a causal link is on the victim. The absence of a causal link between fault and damage can be disclosed from the fact that the damage would have appeared even without the fault of the perpetrator.

That burden of proof can be relieved and based on common knowledge (*prima facie* evidence—on first sight). It is almost the same as the “*res ipsa loquitur*” (the case speaks for itself) rule in Common Law jurisdictions.

The fault of a third party or the victim can lead to a split liability, because there is a combination of errors.

Belgian Law uses the “Equivalence theory.” This theory argues that each conduct, which is a condition for the occurrence of the concrete reprehensible event, is considered a cause. If that cause is ignored, then the accident would not have occurred in the same way. The cause must be the “*conditio sine qua non*.” There is no distinction made between the different causes; each cause is equivalent, no matter how slight that cause may be (*culpa levis*).

## 9.4 Damage and Compensation for Damage

Damage is the most essential element of the trilogy of fault, injury, and causation.

Without damage there will be no liability, while it is possible that there is liability without fault (no-fault liability). The Civil Code (Articles 1382–1386 of the Civil Code) gives no definition of what damage really is. The exact meaning of damage is established by case law.

Damage is a static concept, while compensation is a dynamic concept [3].

The most classical legal definition of damage is the negative outcome of a comparison between two conditions: the current status of the victim after the tort and the hypothetical situation in which he/she would have stayed if the unlawful act or omission did not exist. Damage is, in fact, the disadvantage or loss that is suffered by the victim of an unlawful act.

The compensation for damages is a dynamic concept, namely the restoration of the victim to the situation in which he/she would have remained if the tort was not committed. That can be done by medical/dental treatments or by pecuniary compensation. Restoration of the damage has a priority over pecuniary compensation.

Damage must be certain, personal, and legitimate.

The legal literature [4] and jurisprudence [5] agree that a breach of the law is not absolutely necessary; a breach of interests is sufficient, if that interest is legitimate and that both the existence and the size of the damage are certain.

To correctly evaluate the physical damage, the victim must necessarily find the assistance of a medical practitioner.

Both parties in a dispute must contribute to the proof. The burden of proof should be distributed on the basis of good faith in carrying out agreements [6].

The role of the Judge is neutral; he must adhere to the evidence, documents, and facts submitted by the parties and he must ascertain the equality of the parties in court. The judge can request that certain supporting documents be submitted, even if these documents are in the possession of a third party. The evidence of the damage can be delivered by all legal means. He decides what the content is of the mission given to the expert-witness.

If the existence of the damage is established, the Judge must budget it. Only the existence must be sure, not its size. If the extent of the damage cannot be budgeted correctly, the Judge will do it “*ex aequo et bono*” (to equity). In that event, the Judge must motivate his decision.

Hypothetical damage may not be reimbursed. The liable party will only have to pay damages if it is certain that the assets or the moral condition of the victim are affected. It does not have to be an absolute certainty. A legal or moral certainty is sufficient.

Damage can also occur at a later time and if a causal link can be established it has to be taken into account.

Besides the damage for the degradation of the physical integrity, there is also moral and aesthetic damage, travel costs, temporary and permanent impairment

(invalidity), and temporary or permanent incapacity to work. The compensation for damages is integral and all types of damages will be taken into account.

#### ***9.4.1 Loss of a Chance***

The victim loses the possibility to acquire a benefit or to avoid a loss because of the tort.

The damage must be compensated, provided that the opportunity is real and that the loss of a chance is established. The compensation should be in proportion to the degree of probability.

In some recent judgments of the Court of Cassation [7], the application of the loss of a chance is apparently undermined. It must be certain that the loss of a chance (and the injury suffered as a result of that) is due to a mistake and a causal connection between the fault and the damage must be demonstrated. If the injury is not related to the error or would have happened anyway, even in the absence of the error, there is no reason for compensation of damages.

#### ***9.4.2 Reservations for the Future***

It is often impossible to predict the future evolution of an injury. The condition can sometimes seem stabilized, but experience has shown that in some cases an aggravation can occur after a lapse of time (even years). It is then of the utmost importance that a reservation is made for the future evolution. Only in this way can we be certain that the possibility to assess the aggravation later is safeguarded. The expert and also the Court must take up in its report/decision; otherwise, it will be impossible to claim it later.

#### ***9.4.3 Budgeting the Damage***

The Judge will budget the damage at the actual price at the time of his decision. It must be an integral compensation for damages. The damage must be calculated in “*concreto*.” In *concreto* means that the calculation of the compensation for damage must be done by invoices or prescriptions for medical treatments and take into account the concrete salary. It has to be the exact price paid for the treatment and not an average price suggested by the expert.

He will take into account increases in the price of the treatments, monetary inflation, increased life expectancy, and all the other circumstances specific for the person of the victim.

The courts do not take into account facts happening after the unlawful act or omission, which have led to an increase of the damage, if there is no causal relationship with the tort.

The compensation is integral, correct, and objective, all the damage, not more, but also not less. Only the error of the victim may reduce the amount of the compensation.

#### ***9.4.4 Compensation or Reparation***

Reparation is the first choice. The Court of Cassation [8] ruled that the injured party is entitled to seek recovery if it is possible or requested by the injured and/or offered by the liable party.

In many cases, however, reparation does not cover all the damage. The placement of a crown or implant will never be as good as a natural tooth. The victim is doomed to live with an Ersatz. Additional damages on top of the reparation are sometimes awarded to the victim.

#### ***9.4.5 The Duty to Limit the Sustained Damage***

The insured person must take all reasonable steps to reduce the damage. There is not a general obligation to do so, but he shall take all reasonable and necessary measures to avoid that the damage will grow [9]. The Court of Cassation [10] says in the following way: “Whereas the injured person is in principle entitled to full compensation for his injury, he is not required to limit the damage as much as possible, but he only has to take reasonable measures to limit the damage, and he is only required to do so if that is consistent with the attitude of a reasonable and prudent person.” If he doesn’t do so, he will not receive full compensation.

On the other end, a victim taking measures that are excessive, extravagant, and overshooting the target will also not get full compensation. He will only receive a compensation which corresponds to the full compensation applicable to his damage.

### 9.4.6 *Preexisting Conditions*

The preexisting condition is a concept that can in fact be divided into three assumptions: the predisposition to damage, the aggravation of the preexisting condition, and the advancing of the damage.

In case of a “*Predestination of damage*,” there is an existence of negative characteristics with a potential to cause greater damage than one would expect in a normal person: classical examples of this are the man with the egg skull or the patient with hemophilia.

In that case, the preexisting condition is not taken into account and all damage sustained must be entirely reimbursed. Cassation [11] argues that the fact that a pathological predisposition of a person has contributed to the injury does not relieve the obligation of the contributor to reimburse the full damage, except when it comes to effects that, even without the tort, would have occurred. “*The tortfeasor must take the victim as he/she finds him/her.*”

The second assumption is about the “*advancing of the damage.*” Acceleration of the injury is a dynamic process. An existing eye disease will in the event of an accident lead to quicker blindness or a dormant cancer may result in earlier death of the victim than normal. In these cases, there is no obligation to provide full compensation for the injury because the damage would have occurred even without the error of the contributor. The only thing that must be determined is the exact moment when the injury resulting from the accident would be overtaken by the evolving situation. From that moment on all compensations for damages come to an end.

“*Aggravation of a Preexisting Condition*” We have a health condition, which is not perfect, but the condition is static and not evolving. The earlier damage is stopped by a treatment. The Court of Cassation stated that: “In case of an injury caused by a wrongful act or omission, all effects contributing to the damage will be taken into account including those related to the already existing weaknesses.”

## 9.5 How to Get Compensation for Physical Damage

The first thing that has to be established is to find out if a third party is involved.

If not, the victim receives compensation from the basic Health insurance or from the Accident at work Insurance. *Recognition* of the accident at work is necessary in the case of an accident at work. Also, special personal insurance against physical damage is a possibility. This is also the case when the third party cannot be identified.

If the third party is identified, liability must be established by a Court decision or by recognition of the liability by the perpetrator or his insurance.



Fig. 9.1 Pathway to get compensation for physical damage

If the third party is liable and has insurance, the insurance company will pay the compensation for damages sustained. If he has no insurance, the third party will have to pay the compensation for damages itself.

If the third party is not liable, compensation only comes from health insurance or personal insurance (Fig. 9.1).

## 9.6 The Investigation of the Damage

### 9.6.1 *The Immediate Treatment*

The first treatment will often take place in the emergency department of a hospital. The staff creates a conclusive report about the injuries sustained and the accomplished treatment. From there on the healthcare treatments will be followed up by the general practitioner.

The victim has a duty to make a file containing all the evidence such as reports, X-ray examinations, photographic evidence, costs of the treatment, and reimbursement of medical costs via the sick funds.



### **9.6.2 *Investigation by the Medical Advisor of the Insurance Company***

If the third party is insured, the victim will be asked to undergo a medical examination by the medical advisor of the insurance company. If the victim has a Legal expenses insurance, he will undergo a second examination by the medical advisor of this insurance company.

These medical advisors must defend in an objective way the interests of the insurance company: Is the report of the treating medical practitioner correct? Is there a causal connection between the accident and the claimed damage and how can the treatment be done in the most fair, accurate, and appropriate way?

There is no contradiction between objective advice and defending the interests of the insurer. It is not in the interest of the insurer if the medical advisor should minimize or maximize the budgeting of the sustained damage. When he does so and when the insurer refuses to settle the case based on the report of his medical advisor, the victim may start a judicial procedure. If it then becomes clear that minimizing or maximizing the damage was not correct, the judicial procedure could have been avoided. The insurer will have a lot of extra costs such as the costs of the expert-witness, his own lawyer and the lawyer of the victim, the costs of his dental advisor, and the costs of the procedure.

A medical advisor of an insurance company is a qualified doctor in medicine with a specialization in insurance medicine. That is a 2-year course and there are regularly symposia that they can attend with topics in the field of insurance medicine and insurance law. This is a Master of 2-year jointly organized by the Universities of Ghent, Antwerp, and Leuven.

## **9.7 Out of Court Settlements and Legal Procedures**

### **9.7.1 *Settlement Between Parties***

Many cases will be solved out of Court by a settlement between the parties. That does not mean that mutual concessions must be made in relation to the extent of the damage. That would not be fair. It excludes the costs of a judicial procedure and it is faster.

### **9.7.2 *Medical Amicable Expertise***

It is a contractual investigation, but it has the same value as a judicial expertise. It is less formal than a judicial expertise and it is in general faster. The two parties are

represented by medical advisors (a medical advisor of the insurance company and a medical advisor who represents the victim).

This form of settlement of disputes can be very interesting, on condition that both parties agree on the nomination of a third, jointly chosen, expert. If they do not agree about the third expert, then the third expert will be nominated by the Courts. It is the task of this third expert to decide all points of disagreement and to make a final report. The cost of the medical amicably expertise is spread over the insurance companies. Each party pays the cost of their medical advisor and the cost of the third party will be split into half. All parties are invited to be present at each step of the procedure and all information is made available to each party.

### ***9.7.3 Judicial Procedure in Civil Courts***

The Judge can appoint an expert-witness, but before doing so he must be sure that such an investigation is necessary and appropriate and cannot be solved through other less expensive means [12].

The judge can appoint any expert with the necessary qualifications in order to accomplish the mission. There are no official lists of experts, although officious lists exist in the Courts of Law. The ambition of the actual Minister of Justice is to establish a national database of legal experts. A recent Law is issued on 10.04.2014. Everyone who wants to be appointed as a legal expert must prove 5 years of professional expertise, the necessary knowledge of his professional field and the law. Implementation is foreseen in December 2016.

Medical experts investigate the available evidence and give technical advice based on their findings. The judge decides the value of the evidence, but has to recognize the strength of the evidence. This means that parts of the report may not be used outside of the context of the report, nor can the judge add anything to the report that is not mentioned, or dispute the existence of the facts of the case. The advice is not binding, so the judge can decide whether to follow or not the report of the expert.

Medical experts can be challenged if they have too close relations with one of the parties. An expert who has any knowledge of a possible challenge will warn the parties or refuse his mission. In that case another expert will be assigned.

The Judge describes the exact mission of the expert, the name and address of the expert, and the monetary provision of the expert. The judge will be kept informed at regular times about the evolution of the proceedings of the expertise.

The expert will convoke all parties to be present at the first meeting. Each party has to present all pieces of evidence at that meeting. All parties have the duty to cooperate with the expert. All parties are invited to be present at each step of the procedure and all information is made available to each party.

The expert will discuss the clauses of his mission with the parties. If both parties agree, some extra investigations can be added to the mission. The expert will hear and question the parties. If some specific further investigations are necessary, the

expert will supervise these investigations and make sure that all parties can be present at these investigations, unless they agree that these investigations can be carried out without their assistance. These investigations are carried out by other professionals, specialists in their field of medicine. These investigations are just for medicolegal purposes.

Risky invasive diagnosis or treatments are not allowed. The victim must be informed and has a right to refuse.

X-rays, CTs, or Cone Beam CTs are possible if a correct diagnosis of the injuries cannot be reached with other means or deduced from already existing material.

The expert will decide if further meetings are necessary and will also give an estimation of the cost of the proceedings.

The expert has to finish his/her investigation in a reasonable period and the Judge shall only give permission for a prolongation if it is absolutely necessary and if all of the parties agree.

When the dossier is complete, he/she will write a provisional report (which contains already an advice) and send it to all parties, who have the possibility to make their remarks within a certain time. The expert must answer these remarks in a motivated way and if necessary change his/her conclusions.

He/she will then make a conclusive final report, which is sent to the Judge with all of the evidence. At the same time a copy of the final report is also sent to the parties. At the end of the report, the expert takes an oath and signs the document. If that is not done the entire report is null and void.

If the Judge decides that it is necessary, the expert-witness will be convoked to give evidence in Court and will testify under oath (the oath of expert-witness). The expert can give an opinion concerning any issues that may arise. It is also possible to hear the medical advisor of the liable person, but that is not often the case. That technical advisor does not take the oath of the expert-witness but the oath of a witness.

Appeal is possible by the Courts of Appeal and a new expert can be nominated. That expert may consult all the evidence and also the report of the first expert.

#### ***9.7.4 Procedure Before the Fund of Medical Accidents***

It is a two-way system: The patient has the choice between a court procedure or a procedure according to this law [13]. The initiative to investigate the case comes from the FUND of Medical Accidents (FMA). The procedure is in theory free for the patient and the practitioner. It is also rapid. The aim is that the procedure should be concluded within 6 months.

The FMA investigates the case and establishes liability or its lack and will provide compensation for damages in some cases without any fault, but only under some very specific conditions: it has to be abnormal, unforeseeable damage, taking into account the current position of science, the actual condition of the patient, and the objective predictable evolution of their condition.

The patient has to request an investigation by the FMA by sending a registered letter, describing what happened, the name of the practitioner, and a description of the damage. The FMA will investigate the case if receivable and give an advice within 6 months. If the claim is not receivable the patient can bring their case to a court of Law.

The FMA collects all the information from all parties and shall, if necessary (complicated case), organize a medicolegal investigation by an impartial medical expert. Parties can be assisted by lawyers and medical advisors and the cost of investigation is advanced by the FMA. The advice of the FMA is not binding, but it can be used later in a Court of Law. The costs for the assistance in the procedure (lawyers, medical/dental advisors) are not yet regulated by the law.

That advice should be given within 6 months. It is sent to all parties. If liability is not withheld the patient can bring the case to Court. If liability is withheld, the FMA will ask the insurer to do a proposal.

The compensation for damages is complete and integral, including also moral, aesthetic damage and incapacitation, and also the loss of a chance on a better outcome is covered.

The FMA pays the patient in case of:

- A medical accident with no liability but under certain conditions, which are at least 25 % invalidity, 6 months unable to work, great loss of quality of life, and when the patient dies.
- Further conditions are that the accident is not a normal evolution of the existing condition of the patient, that it is abnormal, not foreseeable, or not predictable, or if the damage could have been avoided taking into account the highest level of actual science and if it was not an accident caused by a defective product. In case of a medical accident with liability and no or insufficient insurance, the Fund starts a procedure against the practitioner.
- If insurer makes a proposal that is obviously insufficient, the Fund starts a procedure against the insurer and/or practitioner.

The advice is sent to all parties and the insurer should make a proposal if the FMA withholds liability. In that case:

- The insurer can immediately dispute the liability of the practitioner.
- If the insurer does not react within 90 days, he/she will receive a registered letter from the FMA. If there is no reaction within a month it is accepted that the insurer does not accept the liability advice of the FMA.
- In both instances the patient can bring the case before a Civil Court of Law.

When the insurer accepts the liability, they will send a proposal to the patient (also to all other parties).

- In that case the patient has 90 days to accept that proposal. If the patient does not react within 90 days, he/she will receive a registered letter from the FMA, and if there is still no reaction, the case will be closed.
- The patient can ask the FMA if the compensation is sufficiently reasonable. If not, the FMA will pay the compensation to the patient and start a procedure against the insurer in a Court of Law.
- The patient accepts the proposal: he/she will be paid within a month.

### ***9.7.5 Procedures by Accidents at Work and on the Way to and from Work***

Most of these accidents are dealt with by the medical advisor and the general practitioner.

The victim can also go to the Court of Social Affairs, if no agreement can be reached. This Court works in the same way as the Civil Courts. But they can only decide the pure physical damage and the monetary compensation of the economic disability. All other matters like aesthetic and moral damage and damage to goods (clothes, car) must be obtained by a procedure before the Civil Courts.

The costs of a procedure before the Court of Social Affairs are covered by the Insurance Company that covers the compensation for accidents at Work.

## **9.8 Qualifications of the Medicolegal Experts**

### ***9.8.1 Forensic Pathologists***

These medical practitioners are mostly linked to a University Unit of Forensic Medicine. They all have a specialty in Forensic Pathology and a good knowledge of the legislation in relation to the investigation of crime. Forensic Medicine has been recognized since 2002. Training involves a 5-year specialization in Forensic Medicine, including 1.5 years of Clinical Pathology. They also have the specialty in Insurance Medicine and can be nominated in Civil Cases.

### ***9.8.2 The Medicolegal Experts in Civil Cases and the Medical Advisors of Insurance Companies***

These medical practitioners mostly followed a 2-year specialty in insurance medicine and are familiar with the different court procedures and the evaluation of human damage. Since 2007, this specialty has been officially recognized.

There are three important medicolegal societies in Belgium:

- Koninklijk Belgisch Genootschap voor gerechtelijke Geneeskunde (Royal Belgian Society of Forensic medicine).
- Nationaal college van gerechtsdeskundigen van België (National College of Legal Experts in Belgium).
- Belgische vereniging van geneesheren-specialisten in de verzekerings- en expertise geneeskunde (Belgian Society of medical doctors, specialists in Insurance and Expertise Medicine).

## **9.9 Ascertainment Methodology**

The medicolegal expert will include the mission given to him/her by the Judge (Court procedure) or the contractual mission in case of an Amicable Medical Expertise.

He/she will compose a complete file, including all medical reports and invoices related to the medical treatments and he/she can ask the parties to produce all the information needed to accomplish the mission.

He/she will examine the victim and describe the injuries sustained in great detail, the cause of the accident, the nature and the possible consequences, and the medical treatments that were necessary until the date of consolidation and give a prognosis for further treatments and medication after the date of consolidation. All these items will be taken up in his/her final report, also called “the consolidation report.”

### ***9.9.1 The Report***

In accidents at work cases, The Law foresees the following description: the social and economic antecedents of the victim, a possible preexisting condition, the first injuries, the evolution of these injuries, the permanent injuries [disability rate according to the Official Belgian Scale of Invalidity (OBSI), the temporary and permanent economic disability, provided prostheses and orthoses, the date of consolidation, and elements that must be taken into consideration to determine the need for domestic aid.

This is more or less the same in Civil Cases.

It starts with the *text of the mission* of the medicolegal expert, followed by the *list of relevant documents* received from the parties.

*The personal anamnesis*: this consists not only in a description of the medical findings, but also in describing the probable consequences for the social, professional, and familial role of the victim in the community at large.

This *social anamnesis* contains his/her *personal data*: name, address, nationality, date of birth, marital status, telephone, and E-mail. This identifies the victim and gives them a specific place in the community.

Also *socioeconomic data* such as education, professions, driver's license, domestic activities, sport activities, and hobbies must be described in detail, because it may help in defining what his/her possibilities will be on the job market after the accident.

*Medical information* (sicknesses, operations, previous accidents, previous prostheses/orthoses) is important for the determination of possible preexisting conditions and the influence they might have on the evolution of the sustained damage of the actual injuries.

A detailed interview of the parties in the procedure will give the medicolegal expert more information about the facts of the accident (causal relation) and the exact sustained damage. The provided documents consist of reports from all those who have given treatment to the victim in great detail. It allows the medicolegal expert to reconstruct the complete treatment and the evolution of the injuries in a chronological way. It will give a good idea of necessary treatments and medication in the future. Also, temporary economic disability can be deduced from this information as well as the temporary need for domestic aid and the possibilities for the victim to continue their hobbies and sports activities.

### **9.9.2 The Date of Consolidation**

This can be the date that the injuries of the victim are more or less healed/stabilized and will not change tremendously in the future. It is the date that a compensation for damages can be calculated. In this context, healing means that the victim has no permanent economic disability or physical/psychic disability anymore.

If the patient suffers from persisting injuries, these must be described in detail. The patterns of complaints include the functional and social aspects of the actual condition of the victim.

The clinical examination of the medicolegal expert must be complete and if specialized examinations are necessary, the victim will be referred. The medicolegal expert cannot conclude or order that invasive examinations should be performed.

The determination of the temporary and permanent disability is also a task of the medicolegal expert. Personal disability is not the same as economic disability, although the disability can have influence in the professional, personal,

domestic and social life of the victim. All these disabilities must be separately determined.

The medicolegal expert must evaluate the economic disability by answering some particular questions: what possibilities on the job market are left for the victim, will instrumental/technical aid or domestic aid be needed, and what are the problems in his/her social and cultural life.

Reservations, which make a revision possible in the future, must be explicitly mentioned in the final report and in the judicial decision of the Court.

A consolidation report is a very important document containing the complete history of the sustained damage including the antecedents, the exact description of all damages, and the objective and subjective consequences.

## 9.10 Evaluation Criteria

The Table is indicative in nature and will only be used if the exact costs cannot be proven. Even then there is a possibility to deviate from the proposed costs of the IT. It is the Judge who will decide. The IT is a kind of instructional booklet for the medicolegal expert.

The medicolegal expert will examine the victim and describe the physical and psychic damage caused by the accident. These findings will lead to the determination of the disability rate and the negative implications on private, domestic, and professional/economic life. Each of these implications can lead to a disability.

Other more specific consequences must be taken into account if they cannot be included in the private, domestic, or economic field, such as pain, aesthetic, sexual, social, and cultural damage.

A special item is the preexisting condition and its consequences on the determination of the damage. One of the most important things to determine is the date of consolidation. Before that date we deal with temporary damage, but after that date with permanent damage.

### 9.10.1 Temporary Damage

The necessity of *prostheses, orthoses, technical aids, and adaptations on the house or car* are determined and serve to ease the life of the victim in their private, family, and professional activities. In some of these cases, the medicolegal expert will need/ask the assistance of a technical advisor. The medicolegal expert will then determine the costs and these must be proven by the victim through invoices or specifications.

*The aid of a third person* is sometimes a necessity (expressed in hours/day). A description of the domestic aid, the qualifications of the social workers, and the number of hours is done on a scale of 0–100 for domestic disability. That is



important to determine the exact cost per hour of each social worker. These rates are normally fixed by labor contracts between employers and employees for the different groups. The IT foresees a forfeit of 10 € per hour for non-qualified third persons. That is applicable if the third person is a family member.

*Personal temporary disability*, taking into account the nature of hospital treatments, is estimated on a scale from 0 to 100 and states that the physical or psychic temporary disability is complete or partial. The IT foresees a monetary compensation of 31 € for each day of hospitalization and 25 € for each other day of temporary disability at 100 % and then in proportion to the degressive disabilities.

The temporary domestic and economic disability (on a scale from 0 to 100) is described separately from the physical or psychic disability.

The *temporary domestic disability* is estimated by the IT at 20 € per day at 100 % for a single person and raised by 5 € for each child that is part of the family.

The *economic disability* takes into account the net loss of income. The compensation should always attain the same net income that the victim would have had without the damaging facts. If the victim starts working again with their handicap and if the exact costs of these extra efforts cannot be calculated, the IT foresees 20 € per day at 100 % from the day that the work was resumed.

*Temporary aesthetic damage* is normally not envisaged, unless in specific circumstances (for example, very serious burns or disfigurement).

The *temporary sexual damage* will be decided by the Judge—the expert will describe the negative consequences and its influence on the sexual life of the victim.

The personal suffering (*quantum doloris*) is on a scale from 1 to 7. If the rate is from 1 to 3, the quantum doloris will be integrated in the personal disability rate. From 4 to 7 they are considered to be an extra damage. The IT foresees a daily compensation: 35 € for 4, 40 € for 5, 46 € for 6, and 53 € for 7.

*Loss of a school year*. This damage consists of a material damage, a moral damage, and a loss of income in the future. In the case of a lump sum compensation the IT foresees 390 € for primary school, 1000 € for secondary education, 4000 € for the loss of a year at University if the student resides at the University, and 2000 € if he/she resides at home. A further 3750 € is foreseen as moral damage, and a sum that equals the net income of the first professional year (to be proven).

### 9.10.2 Permanent Damage

The *permanent disability* starts at the moment of consolidation.

The expert will give a detailed opinion as to the date of recovery from the injuries or their consolidation and will describe with precision the remaining complaints as well as the persistent injuries. In addition, the expert will indicate to what extent these attacks on the physical and mental integrity are attributable to the accident.

This refers to costs for future medication, surgery, renewals of prostheses/orthoses, and costs for maintenance. The costs are calculated on the basis of the price at the time of the completion of the report and capitalized. Only treatments that will certainly be needed in the future and in relation to the injuries will be taken into account. A possible worsening of the situation will be included in the form of a reservation.

### 9.10.3 *Methods of Compensation*

There are *three different methods*: the reviewable and indexed annuity, the capitalization, and the lump sum compensation.

The reviewable and indexed annuity is the method of choice because the amount granted corresponds more precisely to the reality of the damage sustained. The lump sum compensation will only be used if none of the two other compensation methods is possible.

Specific *mortality tables* [15] are used to calculate the longevity of the compensation.

The *costs of technical aids and prostheses/orthoses* will be paid according to the real costs at the moment of the completion of the report and capitalized.

The *aid of a third person* will be calculated at the exact cost taking into account their qualification and included in the annuity or capitalized.

The *permanent personal, domestic, and economic incapacities* are calculated separately. If the disability rate is lower than 15 % the calculation will be done in a flat-rate way. If it is higher than 15 % the disability rate will be capitalized. Each incapacity (personal, domestic, and economic) will be divided by 3 and multiplied with the disability rate. See the following example for a better understanding (Table 9.1).

In the first two examples the calculation is done in a flat-rate way according to the estimated incapacity rate (Table 9.2).

In the third example there is a choice between flat rate and capitalization. It is obvious that the compensation is higher with the capitalization method.

The flat rates lower than 6 % differ from those from 6 % on and decrease with age.

The *economic permanent disability* is also estimated on a scale of 0–100, taking into account the profession at the moment of the accident and the possibility that the victim can continue to do the same job partially or completely, eventually with extra efforts on his part.

If a return to his previous job is impossible, the expert will, together with an ergonomist, see if another type of work can be found that is possible with his disabilities. If not, the permanent economic disability is a fact.

**Table 9.1** Permanent personal, domestic, and economic incapacities

Man 30 years			
Personal incapacity	2 %	850 €	1275/3 × 2
Domestic incapacity	4 %	1700 €	1275/3 × 4
Economic incapacity	0 %	0 €	
Woman 30 years			
Personal incapacity	12 %	11,700 €	2925/3 × 12
Domestic incapacity	10 %	9750 €	2925/3 × 10
Economic incapacity	14 %	13,650 €	2925/3 × 14
Man 30 years			
Personal incapacity	25 % lump sum	24,375 €	2925/3 × 25
Personal incapacity	25 % Cap 1	90,109 €	(25 × 365 days) 25 % × 39,500
Domestic incapacity	10 % lump sum	9750 €	2925/3 × 10
Domestic incapacity	10 % Cap 2	29,170 €	(20 × 365 days) × 10 % × 39,959
Economic incapacity	40 % IE—3	55,029 €	(20 × 240) × 40 % × 28,661
Economic incapacity	40 % LE—4	247,631 €	(1800 × 12) × 40 % × 28,661

Cap 1—365 days at 25 €/day and an interest of 1 % annuity (according to the annual tables); Cap 2—365 days at 25 €/day and an interest of 1 % annuity (according to the annual tables); IE—means increased efforts 240 Working days at 20 € per day and an interest of 1 % annuity monthly and until 65 years; LE—means loss of employment with a net monthly salary of 1800 € and an interest of 1 % annuity monthly and until 65 years

The expert will also evaluate in a motivated way the *permanent esthetic damage* on a scale [16] from 1 to 7, explaining the criteria used. If the aesthetic damage could be surgically ameliorated, the expert will determine the costs and the risks involved, probably leading to periods of incapacity and a persisting disability rate. These criteria are the visibility of the scars, age, gender, profession, marital status, and social activities of the victim (Table 9.3).

The expert will describe in a motivated way the *sexual, social, and cultural damage*. It will be the Judge who decides the monetary compensation.

*Sexual Damage* is every loss of sexual activity, but also the loss of the possibility of reproduction. The partner can also install a claim for compensation.

*Social and Cultural Damages* are the deprivation of enjoying cultural events and socializing, but also the impossibility to practice hobbies and sports.

*Reciprocal Damage* Relatives also have a right to a moral compensation, because they are confronted with the suffering of a beloved one.

*Reservations* should be made for the future if there is a possibility that the physical or psychic condition may get worse.

*Death—Costs of the Funeral* In the event that a victim dies as a consequence of the tort, the costs of the funeral will be taken into account. When the duration of survival probability of the one who bears the cost is lower than that of the victim, this one would probably never had to expose them and can accordingly claim full

**Table 9.2** Flat-rate way according to the estimated incapacity rate

Age class	Incapacity	
	<6 %	≥6 %
Up to 15 years	1500 €	3600 €
16 years	1485 €	3555 €
17 years	1470 €	3510 €
18 years	1455 €	3465 €
19 years	1440 €	3420 €
20 years	1425 €	3375 €
21 years	1410 €	3330 €
22 years	1395 €	3285 €
23 years	1380 €	3240 €
24 years	1365 €	3195 €
25 years	1350 €	3150 €
26 years	1335 €	3105 €
27 years	1320 €	3060 €
28 years	1305 €	3015 €
29 years	1290 €	2970 €
30 years	1275 €	2925 €
31 years	1260 €	2880 €
32 years	1245 €	2835 €
33 years	1230 €	2790 €
34 years	1215 €	2745 €
35 years	1200 €	2700 €
36 years	1185 €	2655 €
37 years	1170 €	2610 €
38 years	1155 €	2565 €
39 years	1140 €	2520 €
40 years	1125 €	2475 €
41 years	1110 €	2430 €
42 years	1095 €	2385 €
43 years	1080 €	2340 €
44 years	1065 €	2295 €
45 years	1050 €	2250 €
46 years	1035 €	2205 €
47 years	1020 €	2160 €
48 years	1005 €	2115 €
49 years	990 €	2070 €
50 years	975 €	2025 €
51 years	960 €	1980 €
52 years	945 €	1935 €
53 years	930 €	1890 €
54 years	915 €	1845 €
55 years	900 €	1800 €

(continued)

**Table 9.2** (continued)

Age class	Incapacity	
	<6 %	≥6 %
56 years	885 €	1755 €
57 years	870 €	1710 €
58 years	855 €	1665 €
59 years	840 €	1620 €
60 years	825 €	1575 €
61 years	810 €	1530 €
62 years	795 €	1485 €
63 years	780 €	1440 €
64 years	765 €	1395 €
65 years	750 €	1350 €
66 years	735 €	1305 €
67 years	720 €	1260 €
68 years	705 €	1212 €
69 years	690 €	1170 €
70 years	675 €	1125 €
71 years	660 €	1080 €
72 years	645 €	1035 €
73 years	630 €	990 €
74 years	615 €	945 €
75 years	600 €	900 €
76 years	585 €	855 €
77 years	570 €	810 €
78 years	555 €	765 €
79 years	540 €	720 €
80 years	525 €	675 €
81 years	510 €	630 €
82 years	495 €	585 €
83 years	480 €	540 €
84 years	465 €	495 €
85 years	450 €	450 €

reimbursement (for example, a parent for her child). If the victim's life expectancy is lower than that of the one entitled to it, the latter would have had to bear in the future and his compensation consists in the advance payment of these costs. The compensation is then formed by the difference between the current expenditure and the constant value of this sum payable to the presumed date of death in the assumption that the accident would not have happened

*Death-Damage of the Relatives* This suffering of the relatives cannot be expressed in exact monetary terms and must be done with a lump sum (Table 9.4).

**Table 9.3** Scale for the permanent aesthetic damage

	01/07	02/07	03/07	04/07	05/07	06/07	07/07
Age	Minimal	Very light	Light	Medium	Serious	Very serious	Repugnant
0–10	540 €	2150 €	4850 €	8625 €	10,000 € <sup>a</sup>	15,000 € <sup>a</sup>	25,000 € <sup>a</sup>
11–20	520 €	2075 €	4700 €	8300 €			
21–30	490 €	2000 €	4400 €	7850 €			
31–40	450 €	1800 €	4100 €	7250 €			
41–50	400 €	1600 €	3600 €	6500 €			
51–60	350 €	1400 €	3100 €	5550 €			
61–70	275 €	1100 €	2600 €	4400 €			
71–80	200 €	800 €	1750 €	3100 €			
81 and above	115 €	450 €	1050 €	1850 €			

<sup>a</sup>At least (no maximum)

**Table 9.4** Death and damage of the relatives

Deceased victim	Recipient of the allowance	Indemnity
Spouse/cohabitant/civil partnership	Spouse/cohabitant/civil partnership	12,500 €
Parent cohabitee	Child cohabiting	12,500 €
Parent cohabitee	Child cohabiting already orphan	20,000 €
Parent non-cohabitant	Enfant non-cohabitant	5000 €
Child cohabitee	Parent	12,500 €
Child living in autonomy	Parent	5000 €
Miscarriage	Parent	2500 €
Brother/sister cohabiting	Brother/sister cohabiting	2500 €
Brother/sister non-cohabiting	Brother/sister non-cohabiting	1500 €
Grandparents cohabitants	Grandchildren cohabitants	2500 €
Grandparents non-cohabitants	Grandchildren non-cohabitants	1250 €
Grandchildren cohabitants	Grandparents cohabitants	2500 €
Grandchildren non cohabitants	Grandparents non-cohabitants	1250 €

Other parents or relatives of the victim must prove that there is an affective specific link that justifies a compensation of 1500–5000 €

### **9.10.4 The Ascertainment of the Physical/Psychic Disability: OBSI**

This OBSI was issued by Royal decree based on the Laws of October 1948 where the reparation of physical damage of soldiers, political prisoners, and members of the resistance was laid down in percentages of impairment. This Scale is mainly used in Belgium for the evaluation of physical disability.

The OBSI gives a complete overview of all possible disability rates for the entire body. It also gives directives on how to calculate the different disabilities. It is a booklet of 115 pages.

There are 15 chapters: *Bones and joints* including the head, the spine, upper and lower limbs, chest, pelvis, protheses, and ortheses; *Muscles*; *Blood circulation* including the heart, blood vessels, and lymphatic vessels; *Respiratory system* including trachea, bronchi, and lungs; *Digestive tract* including the mouth, pharynx, esophagus, ductus thoracicus, stomach and diaphragm, small intestine, colon, rectum, peritoneum, liver and bile, pancreas and spleen; *Blood diseases*; *Urine and genital organs*; *Neuropsychiatry* including brains and spinal marrow, peripheral nerves, mental disorders; *Diseases of nose, throat, and ears*; *Ophthalmology*; *Skin diseases*; *General diseases* including septicemia, tuberculosis, endocrinology, rheumatic diseases; *Tropical diseases*; *Acute intoxications*; *Concentration Camp pathology*.

### 9.10.5 *The General Principles of the Calculation of the Disability Rate*

Besides the OBSI, Belgian medicolegal experts also use the European Medical Scale for the ascertainment of physical and psychic damage.

Another interesting Scale is the ELIDA scale (Estimation of Loss of Independence in Daily Activities) for the determination of the need of third-person aid in case of disability.

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