ASSESSMENT OF DISABILITY

ON APPLICATION OF DISABLEMENT GRADINGS AS PART OF LEGAL DECISIONS CONCERNING COMPUTATION OF ECONOMIC COMPENSATION

BY

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1. INTRODUCTION

The primary goal of any society ought to be to offer handicapped people treatment and rehabilitation in order to improve their ability to function as normally as possible. Places of work and social conditions should be adapted so as to enable them to make the optimal use of their resources. However, this is not always being done, and quite often it is difficult or impossible for handicapped people to undertake the tasks carried out by most of the other members of society. Therefore, in a society with a money economy, the question arises whether they should be financially compensated.

During the 20th century the industrialized countries have seen the emergence of a number of public compensation systems. Handicapped people may be granted various forms of aid under the public social security system, they may benefit from private insurance schemes, and/or the conventional law of torts may warrant payments of compensation.

As a rule the amount of compensation depends on the severity and inconvenience of the individual's handicap. A disability degree is fixed, and this is an important factor in the computation of the compensation amount. Other factors frequently taken into account at this computation are the individual's previous income, age and sex, the current interest rate in society and statutory or agreed maximum amounts.

This paper will render an account of the principles underlying the assessment of the degree of disability. I shall submit a systematic survey of the disability concepts applied in Norwegian legislation and in legal and medical writing. To begin with I shall present a model on the basis of which all the different disability concepts may be explained.

We are now in the borderland between law and medicine, specifically social medicine, rehabilitation medicine and insurance medicine. I am using as a basis the works of the most prominent Norwegian physicians in this field. I have not examined foreign medical literature. The model and the general ideas in the following are shaped with a view to attracting international interest.

2. A MODEL FOR COMPREHENSION OF THE DISABILITY CONCEPT

2.1. *General comments*

The concept of disability tells us something about how the individual manages or does not manage to carry out the tasks with which life confronts him, that is

to say, how the individual *functions*. It is a measure of a person's ability or disability to function. The assessment of the individual's ability to function is nearly always followed by the stipulation of a degree of disability, and this degree is normally stipulated in per cent, so that total disability is said to equal 100 per cent.

Assessment in connection with disability concepts is as a rule done when the disability is caused by accident, injury, sickness, defect or similar events and conditions. So, what we are interested in is a reduction of the ability to function due to a *health condition*.

The concepts "invalid", "handicapped", "disabled" and "crippled" are usually interchangeable. The term "handicapped" is the widest of them, and the term "crippled" the narrowest.

It is a task for lawyers to define the contents of the disability concepts applied in legislation. The assessment of the disablement is done on the basis of certain rules and norms. What kind of norms are these?

Most of the statutory provisions in our legal system are aimed at the *regulation of behaviour*. They are rules (directives) prohibiting certain actions, ordering the undertaking of certain actions or permitting certain actions.

The provisions on disability and handicaps tell us something about how to measure the individual's capacity of social adjustment, for instance as regards the demands of working life. They are rules containing the conditions for classification of a person for a definite degree of disability, i.e. norms of qualification.[1]

2.2. *The resources of the individual*

The individual's ability to function depends on a number of circumstances. Since what we are primarily interested in is a reduced ability to function caused by a health condition, it might be natural to begin with the World Health Organization's definition of the health concept:

"Health is a state of complete physical, mental and social wellbeing and not merely the absence of disease or infirmity."[2]

This definition has been criticized, particularly on account of the claim for complete wellbeing, but it should not here be necessary to go into detail about that. What is most important in this connection is that the health concept contains three main components—physical, mental and social. The circumstances having a bearing on the individual's ability to function may be divided into three groups according to this pattern.

[1] Cf. Sundby, *Om normer,* Oslo 1974, pp. 77 ff., and Eckhoff and Sundby, *Rettssystemer,* Oslo 1976, pp. 84 ff.

[2] Quoted from Strøm, *Lærebok i sosialmedisin,* Oslo 1973, p. 38.

The importance of the physical (bodily or somatic) state to the ability to function needs no further explanation. Injuries to and the loss of limbs and other parts of the body constitute the classical disabling events. To this group belongs also the loss of sight, hearing and other senses. Nor should we forget sickness of the internal organs, such as impaired heart or lung functions.

There should be no need for deliberating on the fact that mental sufferings (psychoses, mental retardation, psychopathy and neuroses) may involve a reduced ability to function. In the course of this century there has been a substantial increase in the number of people having become invalided because of mental diseases. Nearly one third of the total number of people receiving disability pension under Chapter 8 of the Norwegian National Insurance Act are suffering from some kind of mental disease.[3]

Among *social* conditions that may affect the ability to function, can be mentioned housing, whether or not a person receives support and encouragement from his family and others, and whether the handicap in question is generally accepted by society or is looked down upon, such as for instance alcoholism. So far negligible weight has been attached to such social circumstances at the assessment of disability.

2.3. *The tasks of the individual*

When measuring the ability to function, this should be done in relation to the tasks which the individual is supposed to undertake. Roughly, it may be said that grown-ups have three main types of tasks to fulfil:[4]

Work occupies about one third of the time we are awake (assuming a 40-hour working week and deducting for public holidays and 4 weeks' vacation every year). The terms handicap and disability are often used to measure the capacity to carry out work (the working capacity).

Leisure time activities also, for most of us, probably occupy about one third of the time we are awake, a time which is spent on sports, outdoor life, reading, watching TV, playing games, being with family and friends, travelling, etc. So far disability concepts have not been used for measuring the ability to function in these respects.

Personal affairs probably also occupy about one third of our time, such as attending to personal hygiene, preparation of food, eating, shopping, laundry, housework, etc. And disability concepts have been used to measure the functioning ability in some of these fields.

[3] *NOU* 1977: 14 (The Disability Concept under the National Insurance), pp. 81 f.

[4] A somewhat different breakdown is used by Harlem, *Studies on the Relation between Impairment, Disability and Dependency,* Oslo 1976, pp 7 f., and "Uførebegrepet i teori og praksis", *Sosial Trygd* 1976, pp. 171 f.

2.4 *Schematic survey of the model*

The individual's resources	*Legal norms*	*The individual's tasks*
Physical	Various dis-	Work
Mental	ability concepts	Leisure time
	by which ability	activities
Social	to function	Personal
	can be measured	affairs

This table makes it quite clear that disability is no uniform concept. A physically disabled person may, for instance, be 50 per cent disabled where work is concerned, 90 per cent disabled as regards leisure time activities and 10 per cent disabled when it comes to managing personal affairs. A mentally disabled person may be 100 per cent disabled where work is concerned, 10 per cent disabled in respect of leisure time activities and 1 per cent disabled as regards personal affairs.

An indefinite number of disability concepts may be imagined. What is decisive to the substance of each disability concept is which quantity claims one's interest on the "resources" side and which quantity engages one on the "task" side. One may, of course, envisage more detailed or rougher breakdowns than have been done by the present author. However, in what follows I shall confine myself to rendering an account of the various concepts of disability applied in legislation and insurance conditions, and of the theoretical definitions applied.

3. GRADING OF TABULAR DISABILITY

3.1. *The concept*

The degree of disability/invalidism which is linked to injuries to various parts of the body or to the senses is laid down in general provisions. This gives us authorized lists/tables where the different senses, limbs and other organs are assessed in percentages.

The tabular assessment of disability only takes into consideration physical disability to function. As a rule one does not take into account that a certain reduced ability to function, as for instance the amputation of a leg, may have a varying impact on various individuals. Such an amputation will be a much greater strain on an old, heavy person than on a younger person in good physical shape.

One may also have separate tabular rates where age, weight and a number of other individual circumstances are included in the description of the various injuries. Some such individual circumstances have been incorporated in some tables, for instance whether the artificial limb or organ is functioning well or badly, and whether a person is left-handed or right-handed.

In the case of tabular grading of disability the reduced ability to function is not related to definite tasks. The injury is viewed separately. However, when definite injuries in the table have been linked to definite values (percentages), it is because experience has shown that these injuries lead to a definite restriction of the capacity to solve the large register of tasks life consists of.

The stipulation of the individual's degree of disability is based solely on "objectively ostensible clinical symptoms". Doctors have regarded this as the central feature of tabular disability.[5] When such symptoms are the only ones to be taken into account, no one but doctors will be qualified to assess the disability. The specialists within the various branches of medicine will become specialists in assessing injuries and diseases within their own sphere. The ophthalmologist will assess eye injuries, and the lung specialist will assess reduced lung function.

Summing up, one may say that the tabular assessment of disability is general (abstract) in a twofold sense. Consideration is given neither to the person's individual faculties nor to the areas where his functioning capacity is reduced.

3.2. *Accident insurance*

The first disability tables were probably worked out by German private insurance companies in the last century. Accident insurance was the field where compensations were fixed on that basis. The public accident insurance for factory workers was greatly influenced by methods adopted in private insurance.

To start with, the degree of disablement was fixed according to an assessment of the impact of the injury on the person's wage-earning ability. However, gradually certain rates developed for injuries to arms, legs, eyes, etc. One important reason for the introduction of such rates was the establishment of appeal boards and insurance tribunals. Decisions by these were considered as precedents. They were entered into registers, and in Germany these registers were called "Kompassammlungen".[6]

[5] Harlem, "Invaliditetsvurdering", *Tidsskrift for Den Norske Lægeforening* 1959, p. 380, Strøm, "Invaliditetsvurdering", *Tidsskrift for Den Norske Lægeforening* 1959, p. 690, and Hanoa, "Uførevurdering i praktisk medisin", *Social Trygd* 1975, p. 206.

[6] *Instilling om invaliditetsvurdering, erstatningsfastsettelse, tabellsystemer m.v. i yrkesskadetrygdene i Norden, udarbejdet af et nordisk udvalg* (Recommendation on assessment of disability, stipulation on compensation, tabular systems etc. in the industrial injury benefit schemes in the Nordic countries, prepared by a Nordic Commission), 1963, pp. 15–19.

The accident insurances offered by Norwegian insurance companies today refer to tabular assessment of disability. The insurance conditions contain a table stating the percentage of disability for various injuries. According to the conditions "no consideration shall be given to profession, individual faculties or social position" when assessing the degree of disability.

It may seem unreasonable not to take into account the specific nature of each case. But accident insurance is a mass product which the companies are out to market. The insured person buys certain benefits in case he should be injured in an accident. If the disability were to be assessed on the basis of a grading in which a number of individual circumstances were to be taken into account, the result might easily be conflicts as to the degree of disability and the companies' product would become more expensive.[7]

3.3. *Industrial injury benefit.*[8] *National Insurance Act of June 17, 1966, sec. 11(8)*

The first public insurance scheme to be introduced in Norway was the accident insurance for factory workers by an act passed in 1894. After an industrial accident the injured person was awarded compensation for the disability that resulted.

Tabular determination of disablement came into use about the turn of the century. The system worked for more than 50 years without meeting with any serious objections. The injured persons constituted a homogeneous group where the kind of work was concerned. When a worker in the building trade lost an arm the consequences were about the same as when another worker in the same trade lost his arm.

However, as the number of workers in industry gradually came to constitute a decreasing part of the population and with the steadily growing differentiation in trade and industry the tabular grading of disablement became an inadequate yardstick for stipulating compensation for the loss of wage-earning ability. One and the same injury might have varying consequences for the wage-earning ability of an office clerk and for that of an industrial worker.

By amendments in Norway in the 1950s it was decided that, when determining the degree of disablement, due consideration should be given to the nature and extent of the injury as well as to the injured person's income from work before and after the injury occurred. 1970 saw the introduction of a system in two parts under which disablement compensation now consists of two components, disablement pension and industrial injury benefit. The economic loss resulting from a reduced income is determined on the basis of an assessment of

[7] Selmer, *Lærebok i forsikringsrett*, vol. 2, Oslo 1977, pp. 62 ff.
[8] For more details, see Kjønstad, *Yrkesskadetrygden*, Oslo 1979, pp. 185 ff.

the disablement in the light of the person's occupation. The non-economic loss stemming from drawbacks caused by the injury is fixed on the basis of a tabular/medical assessment. The other Scandinavian countries (Sweden and Denmark) have adopted a similar two-part system.

The industrial injury benefit is aimed at providing economic compensation for the loss of physical and mental fitness. It shall compensate a reduced capacity to enjoy the opportunities offered/aggravation of one's life situation. The industrial injury benefit shall compensate reduced mobility, a limited capacity to enjoy outdoor life, to pursue hobbies and other leisure time activities, dancing, entertainment, etc., the loss of the sense of smell or taste, chronic pains (for instance headache), scars and other forms of disfigurement.

The industrial injury benefit shall provide compensation for the injury itself. The intention is that the compensation shall enable the injured person to "buy" things and other benefits to replace those lost because of the injury. A person who has had to have a leg amputated and therefore cannot go walking in the mountains, may for instance be able to go to the theatre or the cinema more often than he could otherwise have afforded.

The industrial injury benefit system in Norway was introduced, I believe, primarily due to the historical background with the transition from tabular assessment of disablement to an assessment based on economic capacity. There are probably other causes as well. First, people have more leisure time, longer holidays and enhanced possibilities of "enjoying life". Such advantages are valued on a par with economic advantages. Secondly, now the general social insurance system covers practically all economic losses due to sickness and injury. It was quite natural that to start with the insurance should be aimed at covering the loss of income and expenses. And, having solved this task, taking care of other consequences of sickness and injury would seem the right track to follow. Here as elsewhere in the history of social insurance, the industrial injury scheme has paved the way.

The industrial injury benefit is a socio-political measure that promotes high priority goals in modern social politics. It is now considered essential that the individual shall be given the opportunity of *self-realization*. Social politics shall not only be aimed at an increase in the economic standard of living, but shall also work towards improving the individual's total life situation. Welfare in the classical sense of the term is no longer sufficient, the welfare concept is being extended to cover a more comprehensive standard of living concept and a general standard of life concept.

The central question in cases of industrial injury benefit is the determination of the degree of disability. Current Norwegian law uses a tabular system as a basis. In many cases it will be possible to determine the degree of disability by way of an authorized Disability Table. The system presupposes that the

tabular disability is an appropriate general gauge of the reduction of the capacity to exploit life's possibilities/"enjoy life". This corresponds roughly to what I called leisure time activities under 2.3.

The table used for the assessment of disability in cases of industrial injury is somewhat different from the tables applied by private insurance companies, which goes to show that tabular disability is no uniform concept. When, for instance, a doctor says that the tabular disability of that particular injury is 40 per cent, one has to know which table he refers to in order to find out what his statement implies.

Many countries have tables containing several thousand descriptions of injuries with appurtenant percentages. The Norwegian industrial injury table contains about 200 injury descriptions. It is, for example, rather detailed when it comes to finger injuries, the reason being that such injuries are very frequent.

The more comprehensive the table, the rarer will be the cases that fall outside the table descriptions. Where a definite injury is not specified in the table, it will be necessary to interpolate in order to determine the disablement degree. One may have such regard as may be appropriate to the prescribed degrees of disablement. Thus the table constitutes a collection of examples from which it is possible to analogize concerning the determination of the disablement degree in connection with other injuries.

As regards the determination of the disablement degree, special questions arise in cases of multiple injuries. These may be simultaneous or successive, where one of them only or some of them can be traced to the industrial accident. However, I shall not go deeper into these complex questions.

The disablement degree shall be determined following an objective assessment of the injury *per se*, regardless of who the injured person is. This may be said to be in accord with the ideal of the law saying that all injuries should be treated equally. A definite injury should result in the same compensation regardless of who has been injured. Such a principle does offer administrative advantages. However, there is some room for taking into account the extent to which the injury represents a drawback to the person in question, see under 4.2.

As a rule, doctors will play a central part in the appraisement of the disability degree. The primary task of medical experts is to *describe* the injury itself. But also when stipulating the degree of disability, medical expertise is usually more important than legal knowledge. This is particularly so when stipulating a disability degree for injuries not listed in the table.

Where English law is concerned, Ogus and Barendt[9] have maintained that determination of the disablement degree in such cases "is a question of fact,

[9] Ogus and Barendt, *The Law of Social Security*, London 1978, p. 311.

and the decision of the medical authorities will generally be regarded as conclusive". They refer to a case where "the claimant suffering from a condition of the finger which was more severe than one prescribed finger condition but less severe than another prescribed finger condition sought to argue that as a matter of *law* medical authorities were bound to assess at a figure between the two prescribed degrees of disablement. The argument was rejected. The discretion of the medical authorities was not to be fettered by thus enlarging the Schedule." According to the Norwegian conception it would be natural for the appeal instance (Commission) to review the decision of the medical authorities in a case like that.

4. GRADING OF MEDICAL DISABILITY

4.1. *The concept*

Medical assessment of disability is based on the disability tables. However, in addition to the objectively ostensible clinical symptoms, subjective symptoms, sex, age, mental health, social position, capacity of adjustment and similar individual properties are also taken into account.

Two Norwegian doctors have stated that often the individual's occupation is also considered.[10] Another doctor does not mention occupation as one of the factors taken into account at the determination of medical disability. In the present author's opinion this factor should not be included in the medical concept of disability, as this might easily result in a mix-up with the occupational disability concept, see under 5.1.

As a rule no distinction is made between the terms tabular and medical disability. They are normally taken to have the same connotations in prelegislative works, in legal writing, within the medical profession and within other groups. It is usage not only in Norway, but internationally as well, that medical disability equals tabular disability.[11] But it is important to make a distinction between tabular and medical disability.

Taking into account mental and social circumstances in addition to the physical injury and disease *per se* is in accord with modern medicine.[12] When determining the degree of medical disability it is not only the specialist on the disease in question who is "entitled to an opinion". Views from doctors with a special interest in social medicine, general practitioners and psychiatrists are necessary or desirable. And other professions as well—particularly psycholo-

[10] Harlem, "Invaliditetsvurdering", *loc. cit.*, and Lindén, "Invaliditetsbegrepet", *Ugeskrift for Læger* 1973, p. 201. See also the Director General of Public Health in *Ot.prp.* no. 22, 1959, p. 13.
[11] Strøm, "Invaliditetsvurdering", *loc. cit.*
[12] *NOU* 1977: 14, pp. 97 ff.

gists and social workers—may provide elements of significance to the determination of the medical disability.

In one respect, however, there is no difference between medical and tabular assessment of disability. Functional handicaps are not related to definite tasks which the individual has to carry out (cf., however, what has been said above about occupation). This is incorporated in the table.

Summing up, one may say that assessment of medical disability is specific (individual) in one respect and general (abstract) in another respect: Consideration is given to the person's faculties (physical, mental and social conditions), whereas the areas in which he does not function normally are not taken into account.

4.2. *Industrial injury benefit*

Stipulation of the industrial injury benefit is not made only on the basis of a tabular determination of disability. It is possible to adjust the degree of disability if "age, sex, weight or other individual circumstances warrant the presumption that the injury causes particular inconvenience to the person concerned".

Adjustments can only be made in favour of the insured person, and to a limited extent. In practice the National Insurance Institution has been restrictive concerning such adjustments.

All things considered, one may say that the industrial injury benefit is stipulated on the basis of a combined tabular/medical assessment of the disability where the main emphasis is on the tabular disability.

4.3. *Compensation for non-economic loss*

By an Act of May 25, 1973, a new form of compensation was introduced into the conventional Norwegian tort law, i.e. the compensation for non-economic loss (the Act on Torts, sec. 3(2)). This innovation in tort law was modelled on the industrial injury benefit.

In the *travaux préparatoires* the question of *why* this new form of compensation should be introduced was only scantily discussed. The Tort Law Commission mentions that the granting of compensation for non-economic loss "must be presumed to be of considerable emotional significance to the injured person".[13] In the Government Bill it says that "compensation in the form of money for the hardship which the injury in itself represents to the person concerned, can never make up for the disability. But the compensation is

[13] *Instilling fra Erstatningslovkomitéen* (Recommendation by the Tort Law Commission), 1971, p. 53.

considered as a means for the injured person of alleviating the hardships caused by the disability."[14]

It is probable that the *underlying reasons* for introducing this form of compensation in 1973, were on the whole very similar to the arguments brought forward when the industrial injury benefit was introduced a couple of years earlier, see under 3.3. Social developments had given people more leisure time and longer vacations, and tort law had achieved its goal, which was to cover the entire economic loss. Therefore, it was only natural that, in order to keep up with the development of society (including that of the economy), tort law should take on new tasks. Contrary to what was the case with industrial injuries, no compensation had previously been given for the non-economic loss in cases where compensation otherwise was awarded. However, some form of "hidden" compensation for non-economic loss had probably existed.[15] But the Tort Law Commission stated that "it is quite evident that today court practice bases the computation of compensation on the economic disability".[16] Thus, it was not a question of carrying on a tradition, as with the industrial injury benefit, but of introducing a new form of compensation.

It will be seen from the Recommendation by the Tort Law Commission that the *purpose* of the compensation for non-economic loss is to provide economic compensation for "limitations of the personal way of living and enjoyment of life which money cannot compensate". As examples are mentioned restricted opportunities to take part in outdoor life and leisure time activities (e.g. when you cannot go skiing or skating due to an injured foot), embarrassing face scars, a defective sense of smell or taste and impaired sight or hearing.[17] On the whole it must be presumed that the purpose of the compensation for non-economic loss coincides with the purpose of the industrial injury benefit.

According to the Act on Torts, sec. 3(2), compensation for non-economic loss is awarded to a person who "has sustained lasting and substantial injury of a medical nature". This formulation is almost identical with the formulation stating the *terms* for the right to receive industrial injury benefit. To entitle a person to an industrial injury benefit, an industrial injury must have occurred. To establish a right to compensation for non-economic loss, the injury must be due to an event warranting compensation—it must be a case of negligence or strict liability (including motor vehicle liability).

Compensation for non-economic loss is determined "giving due account to

[14] *Ot. prp.* no. 4, 1972–73, p. 21.

[15] Kjønstad, *Trygd og erstatning ved personskade—utviklingslinjer, utbredelse og ulikheter,* Oslo 1977, p. 30, especially note 37.

[16] *Instilling fra Erstatningslovkomitéen* (Recommendation by the Tort Law Commission), 1971, p. 30, cf. pp. 12 f.

[17] *Instilling fra Erstatningslovkomitéen* (Recommendation by the Tort Law Commission), 1971, pp. 30 and 57.

the medical nature and extent of the loss and its implications for the personal enjoyment of life". The *travaux préparatoires* of the Act contain no explicit discussion of which category of disability assessment is to be applied for computing the compensation for non-economic loss. The Minister of Justice presumed that basically one should apply "the norms being in force at any time under sec. 11(8) of the National Insurance Act". Possibly the statement of the Minister[18] must be taken to mean that a tabular assessment of the disability, modelled on the industrial injury benefit, ought to be undertaken. There are several indications of the system having been thus conceived during the debate in Parliament (Storting). The Minister of Justice said, *inter alia:*

> The Bill aimed at a system under which the compensation for non-economic loss should be linked to the national insurance benefits. In the opinion of the committee this was rather too undifferentiated. It is a fact that a firm rule—so much for an eye, so much for a finger, as in the law of Hammurabi—might ward off litigation where otherwise agreement prevailed as to the compensation for economic injury. However, life is so manifold. The same injury or the same defect might have widely varying consequences for different persons regarding the opportunities of enjoying life, so that in the opinion of the committee each single case must be assessed individually. Here, as in so many other relations, it must be up to court practice to define a norm.[19]

Against this background it would be correct to say that the courts, when stipulating the compensation for non-economic loss, have a far greater liberty to take into account a person's individual capacities and total life situation than have the National Insurance Institution and the Social Insurance Tribunal when determining the industrial injury benefit. It would probably be right to say that the compensation for non-economic loss shall be stipulated on the basis of a *medical* assessment of the disability. Special consideration shall be given to the individual's possibilities of taking part in leisure time activities.

So far only five court decisions concerning compensation for non-economic loss have been reported.[20] On the basis of these decisions (one of which only is by the Supreme Court) one should be rather cautious in making general statements on the courts' attitude towards the assessment of disability when determining the amount of compensation for non-economic loss. It is important to emphasize that the courts do not have to decide upon the degree of disability when determining the compensation. It also seems as if comparatively little weight is attached to the percentages mentioned in the grounds for the court decisions. The description of the injury and its consequences to the injured person are considered most important. And on this basis a discretionary stipulation of the compensation for non-economic loss is made (without the

[18] *Ot.prp.* no. 4, 1972–73, pp. 22 and 38.
[19] *Odelstingsforhandlinger* 1972–73, p. 257.
[20] Kjønstad, *Yrkesskadetrygden*, Oslo 1979, pp. 312 ff.

courts having to determine the degree of disability, such as has to be done when assessing the industrial injury benefit).

It is not easy to find out how much weight the courts attach to individual circumstances. Computation of the compensation is based on a number of factors—the nature and extent of the injury, individual circumstances, the level of compensation for non-economic loss as compared with the level of industrial injury benefits, etc.[21] Somewhat varying significance appears to be ascribed to the different factors in different court cases. It seems, however, as if individual circumstances are considered as being of greater significance in the decisions on compensation for non-economic loss than when computing the industrial injury benefit.

The assessments undertaken by the courts of the injury and the individual circumstances, are very similar to the assessments undertaken when determining the degree of medical disability. This is in accord with what must be presumed to follow from the *travaux préparatoires*, cf. above.

5. GRADING OF OCCUPATIONAL DISABILITY.

5.1. *The concept*

The degree of occupational disability is determined after an assessment of the consequences of the injury or disease regarding the individual's capacity to continue in an occupation—usually the work which the person in question was engaged in at the time of the injury.[22] If the person concerned is unable to carry out any of his previous work at all, the degree of disability is said to be 100 per cent. If he is able to do 50 per cent of the work, the degree of disability is 50 per cent. It is of no consequence whether he or she is able to carry out other kinds of work, personal tasks and/or leisure time occupations.

It has been said that both tabular, medical and occupational disability neglect "the person behind the injury or disease".[23] In the present author's opinion this is not so where medical or occupational disability is concerned. When assessing occupational disability all the individual's resources—physical, mental and social—should be taken into consideration.

To qualify for assessment of occupational disability a person must not only be a specialist on the disease which this person has, it is also necessary to be acquainted with the person's place of work. The assessment by the industrial medical officer is important when judging the occupational disability of an

[21] Lødrup, *Erstatningsberegning ved personskader*, Oslo 1980, pp. 78–100.

[22] Strøm, "Bedømmelse av invaliditet", *Tidsskrift for Den Norske Lægeforening* 1958, p. 76, Heiberg, *Invaliditetsvurdering og erstatningsutmåling*, Norsk Forsikringsjuridisk Forenings publikasjoner no. 53, 1968, p. 27, and Selmer in *Rettsmedisin* (Lundevall ed.), Oslo 1973, p. 194.

[23] Lindén, *loc. cit.*

employee. When assessing a housewife's capacity to work in the home, the views of the general practitioner whom she uses and of social workers may be significant.

Dr Harlem believes that the concept of occupational disability ought to be done away with. His objection to the term is that it refers to whether the injured person actually has income from work, and not to her or his *capacity* to work. In Dr Harlem's opinion, use of the term will have as result that those who do not exploit their possibilities (for instance because they are lazy) receive too much compensation, while those who show initiative and want to make an effort to manage as well as can be done will get a smaller compensation.[24]

In my opinion the distinction between the ability to and the will to carry out work (or to function in other respects) should not be applied when defining the term occupational disability. This is a general problem connected with all disability concepts which are not of a purely tabular character. In any case the problem is an essential one in connection with the concept of medical disability as well as with that of economic disability. Dr Harlem is a warm supporter of both.[25]

Another writer states that the terms tabular, medical and economic disability are applicable when the disability is of a lasting (permanent) nature, whereas the term occupational disability usually is applicable in connection with temporary disability. If his aim is to describe current Norwegian legislation, there is not much to be said against that. On the other hand, however, I want to object if the intention is to use the distinction between permanent and temporary disability as a criterion for differentiation between the term occupational disability *per se* and other terms of disability. The question of the duration of the disability is a general problem cutting right across the differentiation between the various concepts of disability. There is, for instance, nothing to prevent the determination of the degree of tabular and medical disability at any stage during the development of a disease.

Summing up, one may say that the determination of occupational disability is special (individual) in a twofold respect. The assessment shall be made of the individual person's resources, and the ability to function should be related to definite tasks—the individual's ability to carry out his occupation.

5.2. *Sickness benefit*

Sickness benefit shall compensate the loss of income during the first year after the disease occurred. Under sec. 3(2) of the National Insurance Act the right

[24] Harlem, "Invaliditetsvurdering", *Tidsskrift for Den Norske Lægeforening* 1959, p. 380.
[25] Hanoa, "Uførevurdering i praktisk medisin", *Sosial Trygd* 1975, pp. 206 f.

to sickness benefit as a main rule depends on whether a person is unable to work because of sickness. In a commentary to the National Insurance Act it has been said about this provision:[26]

> If the insured person is to be considered as unable to work only in respect of the work he had at the time when the disability occurred, but otherwise is capable of doing other work, sickness benefit should presumably not be paid, as sickness benefit pursuant to the National Insurance Act is not meant to be a benefit granted because of *occupational disability*. However, this provision ought to be applied with leniency, as the significance of the person being able to do *other* work must be judged on the basis of the circumstances in each separate case.

The practical result of the latter assessment is as a rule that no "duty" to take up work in another trade is imposed on the sick person. This is especially so where it is a question of illnesses of short duration. This again entails that a sick-certificate can nearly always be issued on the basis of an assessment of occupational disability. Only where the sickness is presumed to last for some time, will an assessment of economic disability be undertaken.

5.3. *Service pension schemes*

Most public and private service pension schemes grant benefits in case of disability. The disability concepts applied vary somewhat under the different pension statutes and insurance conditions. I shall confine myself to talking about the main principles of the Act of July 28, 1949, on the Government Pension Fund.

According to sec. 27(1) a member of the Government Pension Fund is entitled to "disability pension when he retires from his position because of sickness or injury and therefore is considered by the Pension Fund Board to be unfit for carrying out his duties in the service". Thus the Act aims at an assessment of occupational disability, but this is being modified towards an assessment of the person's economic ability in sec. 28(3): "The disability pension may be reduced or may lapse entirely even if the member is unfit for service in his position, if it is presumed that he may obtain other suitable occupation."

This should imply that the Government Pension Fund refers to a combination of the two forms of assessment, that is, of the occupational disability and the economic disability.

5.4. *Housewives' disability pension*

The National Insurance disability pension is meant to compensate the loss of income in case of permanent disability. When determining the degree of

[26] Ohldieck, Litleré and Rygh, *Lov om folketrygd*, Oslo 1973, pp. 268 f.

disability under sec. 8(3) of the National Insurance Act, the basis shall as a rule be an assessment of the capacity to engage in other work, see under 6.2.

Where housewives are concerned, the disability is graded on the basis of an occupational assessment. What is assessed is how much of the household tasks the housewife can manage with her handicap and how much she is unable to do.[27] If she only manages to carry out one fourth of the "household tasks" the degree of disability will be 75 per cent.

For nearly all women it is a disadvantage to be assessed in their capacity as housewives (if the intention is to obtain disability pension). Most women can do some work in the home. Therefore they often get a reduced pension or no pension at all (if the degree of disability is less than 50 per cent). If a woman is being assessed in relation to the open labour market, it will often be impossible for her to find wage-earning work, and then she will be considered as 100 per cent disabled.[28]

For categories other than housewives the occupational disability degree will normally be above the level of the economic disability.

6. GRADING OF ECONOMIC DISABILITY

6.1. *The concept*

Grading economic disability means, as in the case of occupational disability, assessment of the ability to work. However, consideration is given not only to whether he can re-enter his previous occupation, but also to whether he will be able to carry out other kinds of work.[29] If a man used to earn 100 000 NOK a year as a building worker, and has to leave this work after an injury, and he is then able to earn 40 000 NOK a year as a caretaker, his degree of disability will be 60 per cent.

Thus, when determining the degree of economic disability, one must find out how much the person concerned would have earned, had the injury not occurred, and how much he can earn when the injury is a fact. The degree of disability is arrived at by calculating the percentage of the reduction in income due to the injury in relation to the income the person would have received, had the injury not occurred.

The characteristic feature of the assessment of the economic disability is that

[27] The National Insurance Institution's circular of September 19, 1970 (08–02), pp. 1 and 4 f., Kjønstad, "Sosialretten", in *Knophs Oversikt over Norges Rett,* Oslo 1975, p. 699, and *idem, Et forsøk med bruk av EDB i rettsvitenskapen,* Institutt for offentlig rett, Skriftserie no. 16, Oslo 1977, pp. 50–57.

[28] *NOU* 1977: 25 (Benefits to Spouses Working in the Home in Case of Disability), pp. 24 f.

[29] See Nord, "Medicinsk och ekonomisk invaliditet", *Uppsatser i försäkrings- och skadeståndsrätt,* 2 (Juridiska Föreningen vid Stockholms Universitet), Stockholm 1971, pp. 133 ff.

it is made on the assumption that the injured person is "obliged" to change occupations if there are other places of work which, after the injury, may provide him with an income or a better income than he would have received if he had continued in his previous occupation after having been injured. Usually grants for education, re-education and other rehabilitation are being introduced simultaneously with the introduction of the economic disability concept into a pension scheme or a benefit scheme. This happened in the middle of the 1950s when the industrial injury benefit scheme passed from using a tabular/medical disability concept to the application of an economic disability concept, see under 3.3. Along with the passing of Norway's first general Act on the Disability Pension Scheme of 1960, an act was passed relating to rehabilitation grants. When it is required, by the manner in which the degree of disability is determined, that the injured person changes occupations, the insurance scheme must also cover the expenses incurred by such a change.

Normally the injured person's income before and after the injury will be the safest guide for determining his economic disability. However, one must keep in mind that the income does not always reflect the individual's ability to function. He may, for instance, receive help from workmates, and it may also be that he does not utilize his possibilities completely.[30]

When determining the degree of economic disability, it is important to have the views and opinions of several professions. Doctors may throw light on the health condition, rehabilitation personnel may estimate the training and education potential, employment advisers may evaluate the possibilities of providing new jobs and tax assessment people may evaluate the income situation.

It has been said that economic disability should be interpreted as "the medical disability corrected by the effect of the patient's external surroundings, that is, corrected by the possibility of obtaining the additional training or education that may furnish him with possibilities of employment and by the possibilities of moving to a place where he may get employment".[31]

It has further been stated: *"Economic disability* is a *medical* disability where particular emphasis is laid on the patient's ability to earn an income, including the opportunity of receiving appropriate training and education and of obtaining employment."[32]

In my opinion one should not, when determining the economic disability, base this on the medical assessment of the disability. One should pass straight on to the person's general ability to earn an income by work. And in this

[30] Gulbrandsen, "Forskjellige faktorers betydning ved invaliditetsfastsettelsen", Paper to *Det femte nordiske socialforsikringsmøde*, Oslo 1960, pp. 12 ff., and *idem*, *Invaliditetsvurdering og erstatningsutmåling*, Norsk Forsikringsjuridisk Forenings publikasjoner no. 53, 1968, pp. 4–9.

[31] Harlem, "Invaliditetsvurdering", *Tidsskrift for Den Norske Lægeforening* 1959, p. 380. See also the Director-General of Public Health in *Ot.prp.* no. 22, 1959, p. 13.

[32] Strøm, "Invaliditetsvurdering", *Tidsskrift for Den Norske Lægeforening* 1959, p. 690.

assessment the health condition will be only one of the factors to be taken into account.[33]

Summing up, one may say that the assessment of the economic disability is special (individual) in one respect and semi-general in another. When assessing the person's qualifications, his subjective properties are taken into consideration. The ability to function is not related to definite tasks, such as, for instance, the person's previous occupation, but to a group of tasks—working effort in some occupation or other—on which one can employ one's resources.

6.2. *Disability pension under the National Insurance Act*

The right to a disability pension under sec. 8(3) of the National Insurance Act is conditional upon the economic ability being reduced by at least 50 per cent. Under sec. 8(5) the amount of the pension is to be graded according to the reduction in the insured person's ability to earn an income.

Sec. 8(3) contains certain guidelines regarding the principles for grading the economic disability: "When assessing the degree to which a person's working capacity is deemed to be reduced, account shall be taken of his actual possibilities of earning an income or of making an effort in a job which is suitable for him, compared to the corresponding possibilities before he became disabled ..."

What must be done, therefore, is to compare the income-earning ability before and after the disability occurred. Determination of the degree of disability shall not depend on the *actual* earnings of the person concerned, but on his *possibilities* of obtaining such earnings. Capital income, pensions and other forms of income not derived from work shall not be taken into account.

These principles apply to everybody, but the practical problems arising in connection with determination of the disability vary from one group to another. A division into four groups is practical—employees, self-employed persons, housewives, and children and young people who are not yet employed.

As for *employees,* the pay before and after the disability occurred will nearly always be decisive when determining the degree of disability. Corrections must, however, be made for pay changes. Besides, lost career opportunities and the loss of possibilities to make extra money (by overtime work) must be considered. Moreover, attention must be paid to whether the person concerned is very energetic or whether he does not do all he can to exploit the opportunities of earning something. It may be difficult, however, to prove that the disabled person is able to obtain larger earnings than he actually does.

[33] *NOU* 1977: 14, p. 194.

After the disability has occurred, an employee will as a rule either be able to continue in full-time occupation or not be able to obtain any work. In the former case the reduction of income will only exceptionally be so large that the insured person will be declared 50 per cent disabled. If no work can be provided, the degree of disability will be fixed at 100 per cent. Considering that the possibilities of finding part-time work usually are few, employees will rarely get a graded disability pension.

Where *self-employed* persons are concerned it would also be natural to base the assessment on the income before and after the disability occurred. But in this case the income will be a far less satisfactory indicator of the person's economic disability. Corrections must be made for a number of factors:

(1) Fluctuations in the income of a self-employed person may often be attributed to a good year or a bad one, as for instance a bumper year for the farmer. Changes in income not connected with the functioning ability are not to be taken into account when determining the degree of economic disability.

(2) As a rule, part of the income of a self-employed person will be capital income.[34] And such income is not to be considered when determining the degree of disability. The same applies to consumption of capital, such as felling timber in the forest in excess of the regeneration.

(3) Part of the income of a self-employed person may frequently derive, not only from his/her own work, but also from the efforts of spouse, children and others.[35] The income of a farmer may, for instance, be the same before and after the disability occurred. Now, if he can manage only half of the work which he used to do, but the previous level of income is maintained by increased efforts on the part of others, he will be considered 50 per cent disabled.

(4) A self-employed person who previously used to do much heavy manual work, may, after the disability occurred, often be able to carry out administrative work.[36] If his business is not too small, this effort might result in a satisfactory profit which ought to be taken into account when determining the degree of disability. A person should not be awarded a disability pension only because he cannot carry out the tasks he used to, but is "obliged" to change "occupations".

(5) Quite often the sensible thing to do will be to change to another form of business after the disability has occurred. The farmer may pass from the heavy and demanding work of growing root vegetables to the easier one of growing

[34] Kjønstad, *Et forsøk med bruk av EDB i rettsvitenskapen*, pp. 21–24.
[35] Kjønstad, *loc. cit.*, pp. 33–49.
[36] Kjønstad, *loc. cit.*, pp. 30–32.

grain. The resulting reduction in income is taken into consideration when determining the degree of the economic disability.

(6) Changes in the income of a self-employed person may often be attributed to taxation issues, such as for instance depreciations. Such changes are not due to alterations in working ability and must not be taken into account when determining the disability.

Under 5.4 I have discussed how the degree of disability is determined for *housewives*. The decisive factor is the amount of the work in the home which the housewife can manage.

A woman who actually is a housewife shall often be assessed in relation to the open labour market (a potential employee), for instance if the husband's income is too small for him to "maintain" her. According to the practice of the National Insurance Institution she is always considered as an employed person if the husband's income is less than twice the basic amount. This amount is adjustable so as to take account of changes in the general wage level. At present it is 19 100 NOK. A woman is also considered as being a (potential) employee if she is a widow, is separated or divorced, or if she has been going out to work before and has been staying at home temporarily only to look after small children.[37]

If a woman is considered as a (potential) employee, the amount of housework she is able to do is of no consequence. The determining factor as regards the grading of the economic disability are her prospects of obtaining income by working outside the home.

As regards *children and young people* who have not been employed before the disability occurred, there is no previous income to which possible earnings after the disability occurred may be compared. In such a case it will probably be necessary to compare these income-earning possibilities with those the person would have had, had the disability not occurred.

6.3. *Compensation for loss of income*

According to sec. 3(1) of the Act on Torts, compensation for lost income and reduced future economic ability is to be stipulated "considering the injured person's possibilities of earning an income by work such as may reasonably be expected of him taking into account his faculties, education, experience, age and possibilities of rehabilitation".

The assessment to be undertaken here is thus an assessment of the economic disability. Such assessment has also previously been used as basis in court practice, see under 4.3.

[37] Circular from the National Insurance Institution of September 19, 1970 (08–02), pp. 2 f., and Kjønstad, *loc. cit.*, pp. 181–201.

When deciding on compensation for loss of future income, the courts do not have to fix a definite degree of disability. The compensation may be determined directly to equal the difference between the injured person's earning possibilities after occurrence of the injury and the earning possibilities, had the injury not occurred. (Here I call attention to the fact that the courts do not have to fix a definite degree of disability when determining the compensation for non-economic loss, see under 4.3.)

Assessment of the economic disability is done along the same lines in tort law as in national insurance law. There is, however, one main difference: In tort law the income-earning possibilities after the injury are compared to what the income-earning possibilities would have been, had the injury not occurred. In national insurance law the income-earning possibilities after the injury are compared to the income earned before the injury occurred. However, in practice the two different methods hardly ever lead to different results, because in national insurance law consideration is given to ordinary pay changes and also to some extent to promotion opportunities which are no longer there.

According to sec. 3(1)(2) "the value of work in the home" is to be equalized with income. The provision is particularly aimed at housewives, but has been given a general formulation. It should therefore be applicable to the efforts of any person in connection with personal tasks that may be classified as housework, see under 2.3. It is not quite clear how compensation is to be stipulated when the injured person's possibility of carrying out housework has been limited. Two different principles are applicable:

(1) To calculate the extra expenses incurred by the injured person having to hire help, buy more expensive food, etc. That will be compensation for incurred and future *expenses* involved by the injury.

(2) To presuppose an ordinary wage for housework, for instance by estimating the housewife's work at what it would cost to hire a maid. If her functioning ability as a housewife is reduced by 60 per cent, the compensation should be 60 per cent of a maid's income. Normally, this latter principle will entail larger compensation than the former.

According to the wording of the Act the latter principle should be the "correct" one. During the time preceding the passing of the Act on Torts, the former principle was the one usually adopted. It appears from the Recommendation of the Tort Law Commission that there has been no intention of amending previous law.[38] In my opinion greater weight should be attached to the wording of the Act than to the *travaux préparatoires*. Neither of these sources

[38] Instilling fra Erstatningslovkomitéen (Recommendation by the Tort Law Commission), 1971, p. 55.

is very clear. It seems that weighty arguments speak in favour of the "housemaid principle", but I shall not go into details about that here.

Since "the value of the work in the home" is to be compensated according to sec. 3(1), the fact that the injury has entailed reduced possibilites of doing housework must not be taken into account in the stipulation of compensation for non-economic loss.

6.4. *Disability pension under the Industrial Injury Insurance Act*

The assessment of disability in the accident insurance for industrial workers has been dealt with under 3.3. In 1953 the following provision was incorporated into the relevant Act:

> When assessing the loss of economic ability, due consideration shall be given to the medical nature and the extent of the injury. Consideration should further be given to the injured person's occupation and his possibilities of earning an income before and after the injury.

Thus, a combined medical/tabular grading and grading of economic disability was introduced, but the chief consideration was to be "the medical nature and extent of the injury". When the new Act on Industrial Injury Insurance of December 12, 1958, was introduced, the system of the combined assessment was maintained, but the main weight was to be attached to economic factors:

> When assessing the loss of economic ability consideration shall be given to the injured person's possibilities of earning an income before and after the injury. Special consideration may also be given to the medical nature and extent of the injury.

This provision still applies to industrial injuries which occurred before January 1, 1971 (when the Industrial Injury Insurance was incorporated in the National Insurance Act).

6.5. *Disability pension under the Acts on War Pensions*

The war pension schemes were forerunners of the industrial injury insurance at the transition from a tabular/medical assessment of disability to assessment of the economic disability. The current provision in the War Pension Acts of December 13, 1946, on assessment of disability conforms to the quoted provision in the Act on the Industrial Injury Insurance. Consequently, a combined assessment of the disability shall be undertaken, and the chief weight is to be attached to the economic situation.[39]

In practice, the determination of the degree of disability under both the Acts

[39] See lov av 13. desember 1946 nr. 21 om krigspensjonering for militærpersoner (Act of December 13, 1946, no. 21 on War Pensions for Military Personnel), sec. 3(4), and lov av 13. desember 1946 nr. 22 om krigspensjonering for hjemmestyrkepersonell og sivilpersoner (Act of December 13, 1946, no. 22 on War Pensions for Home Guard Personnel and Civilians), sec. 8(3).

on War Pensions and the Act on Industrial Injury Insurance is done primarily on the basis of an estimate of the economic disability. Then a supplement is granted for the non-economic loss. If the economic disability is 100 per cent, there will be no room for compensation for non-economic loss under this combined system. That was one of the reasons why a two-track system was adopted within the industrial injury benefit, see under 3.3.

7. ASSESSMENT OF SOCIAL DISABILITY

7.1. *The concept*

Social disability has been defined as the "disability which arises in relation to the contact with people both within and outside the family".[40]

The Director-General of Public Health states that social disability has been used "in connection with the disability which is due to the relationship between the patient, his next-of-kin and his environment in a wider sense. One may, for instance, talk of social disability when a person is being forced to leave work because he or she has to stay at home and take care of a chronically sick member of the family who is in need of nursing."[41]

It has also been said that an assessment of social disability means "an assessment of the individual's social adjustment ability".[42]

Judging from this, the definition of the social disability concept is not very clear. It may probably be used to measure some of the functions which I have labelled leisure time activities under 2.3. The example mentioned by the Director-General of Public Health points in another direction, primarily to the social causes of occupational disability.

When determining a person's degree of social disability, consideration must be given to physical, mental and social circumstances. The individual capabilities and life situation may also be taken into account. In this respect the disability concept is individual/special.

However, in relation to the tasks/functions to which the concept refers, it must be said to be semi-general. Social contact with other people consists of a large and heterogeneous group of tasks, but does not encompass all the tasks which a human being is confronted with.

7.2. *Sec. 5(8) of the National Insurance Act*

Up to 1971 the concept "social disability" had no place in Norwegian legislation. Generally, no economic compensation was awarded for a reduced ability to maintain contact with other people.

[40] Harlem, "Invaliditetsvurdering", p. 381.
[41] *Ot.prp.* no. 22, 1959, p. 13.
[42] Lindén, *loc. cit.*

However, an amendment of March 19, 1971, brought a legal innovation into sec. 5(8) of the National Insurance Act: "To a person whose capacity to function has been substantially reduced on account of sickness, injury or defect" may, for instance, be granted aid for buying a car, having a telephone installed, etc., to enable the person to get out of an isolated existence.

When deciding cases under sec. 5(8) there is no determination of the degree of social disability. But the decisions are to a large extent based on the same kind of considerations as would apply in case of assessment of social disability.

8. CONCLUDING DISCUSSION. CONNECTIONS BETWEEN ASSESSMENTS OF DISABILITY

8.1. *From the theoretical point of view*

Disability is a measure indicating how the individual manages or does not manage to cope with the tasks life presents. The individual's functioning ability depends on a number of circumstances. I have distinguished between physical, mental and social resources. And I have divided the tasks against which the ability to function is weighed in work, leisure time activities and personal matters.

Normally, different concepts of disability are being applied—tabular, medical, occupational, economic and social disability. These terms may be defined as relations between one or more of the individual's resources and one or more of the individual's tasks.

Tabular disability is used to measure the individual's physical resources needed for undertaking an unspecified register of tasks. Medical disability is a measure of the individual's aggregate resources (physical, mental and social) needed for undertaking an unspecified register of tasks. Occupational disability is a measure of the individual's aggregate resources needed for carrying out his previous occupation. Economic disability is a measure of the individual's aggregate resources needed for carrying out some kind of work suitable to the person concerned. Social disability is a measure of the individual's aggregate resources needed for maintaining contact with other people (part of the group leisure time activities).

Across these dividing lines there goes a distinction between temporary and durable (permanent) disability, and also a distinction between the individual's ability and will to carry out certain tasks (ability to function/will to function).

8.2. *A survey of the legislation and the insurance conditions*

Norwegian legislation makes use of all five of these disability concepts and combinations of them. There is a marked tendency to apply the various concepts of disability for various purposes:

The tabular and medical concepts of disability are used when compensation for non-economic loss is to be granted. Insurance companies and administrative bodies, when stipulating the compensation amount for such losses, lay most of the emphasis on the tabular disability (accident insurance and industrial injury benefit). When the amount of compensation is stipulated by the courts, the main weight is attached to the medical disability concept (compensation for non-economic loss). The insurance companies and the administrative bodies have a system which is quite easy to operate, whereas the courts have a system leaving considerable room for discretion.

The occupational and the economic disability concepts are used when granting compensation for the loss of income. If the loss of income is temporary and/or concerns definite groups of persons, the emphasis is laid on the occupational disability concept (sickness benefit, service pensions and housewives' disability pension). If the loss of income is going to last for some time and it is a question of compensation from general benefit schemes, then the economic disability concept is applied (disability pension under the National Insurance Act and compensation for loss of income under tort law).

If under the same category of benefits, compensation is to be made for both loss of income and non-economic loss, a combination of tabular/medical and of economic disability assessment is applied. If the benefit primarily is to compensate loss of income, the main consideration should be the assessment of economic disability (the War Pension Acts and the old Industrial Injury Insurance Act).

So far the concept of social disability has not found a place in Norwegian legislation. However, decisions as to whether benefits are to be granted under sec. 5(8) should be made on the basis of assessments which for the greater part correspond to the assessment of social disability.

Compensation for *expenses* after an injury is not stipulated on the basis of an assessment of the disability. In tort law it is the amount of the expenses involved which decide the amount of compensation. In social insurance law there are definite and detailed rules on which kinds of expenses are to be covered by the social insurance.

8.3. *The connection between grading of tabular/medical disability and of economic disability*

The definitions of the different disability concepts vary substantially. It is not surprising, therefore, that the degree of disability of an injured person may vary according to the definition on which the assessment has been based. This appears from several studies, which cannot be discussed here. I shall, however, quote and briefly comment on some figures concerning decisions made in industrial injury benefit cases. The following table is contained in the report on health injuries subsequent to industrial accidents and the national insurance.[43]

Tabular disability	Degree of economic disability in per cent								Total
	100	80	70	60	50	40	30	15–25	
15–24 per cent	27	1	1		3		1	2	35
25–34 per cent	18	2		1	1	2		3	27
35–44 per cent	10		2		1		1	1	15
45–54 per cent	16								16
55–64 per cent	4			2	1	1		1	9
65–74 per cent	9		1	1					11
75–84 per cent	6								6
85–100 per cent	2								2
Sum	92	3	4	4	6	3	2	7	121

A total of 533 people were awarded industrial injury benefit and 174 people were awarded disability pensions. Of these 121 received both benefits. This means that more than three fourths of those who were considered as being 15 per cent or more tabularly/medically disabled, were not considered as being as much as 15 per cent economically disabled. This is not very surprising. Most people who are disabled according to a tabular or medical assessment are not becoming less able to earn an income.

What is more surprising is that nearly one third of those entitled to disability pensions did not have a tabular/medical degree of disability reaching 15 per cent.

The majority of those entitled to both industrial injury benefits and disability pensions have a low degree of disability according to a tabular/medical assessment. And a large majority of these have been regarded as 100 per cent economically disabled. This goes to show that a low degree of tabular/medical disability may often lead to a high degree of economic disability. As mentioned under 6.2, employees who have been injured will often be able to go on working full-time, or they disappear entirely from the labour market.

[43] *NOU* 1976: 16 (Industrial Health Injuries and the National Insurance), p. 38.