STANDARDIZED OR INDIVIDUAL ASSESSMENT OF DAMAGES FOR PERSONAL INJURY AND FOR LOSS OF SUPPORTER

SOME REFLECTIONS ON THE DANISH TORT LIABILITY ACT, 1984

BY

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1. INTRODUCTION

Widespread dissatisfaction with the courts' practice of assessing damages for personal injury and for loss of supporter was the main reason for the introduction of the Danish Tort Liability Act, 1984.[1] A committee appointed by the Minister of Justice in 1966 criticized in its final report[2] tort awards in Denmark for being too low, noting that the level of damages was much lower than in other Western European countries, including the Scandinavian countries, and even lower than compensation for work-related accidents according to the Danish Workers' Compensation Act.[3] In two previous reports the committee had recommended that the assessment of damages should not be regulated by statute, the argument being that legislation would impede a flexible assessment according to the concrete circumstances of the individual case. Therefore the committee then contented itself with a submission to the courts that the level of tort awards should be increased.[4]

In later court practice, however, the level of damages was only adjusted to the rate of inflation. The real value of the amounts of damages was not increased; instead the degree of standardization in the assessment was. Thus the courts had weakened the importance of the committee's argument against legislation. Especially damages for permanent disablement became heavily standardized. The degree of disablement was determined on the basis of medical disability schedules (e.g. loss of a leg was assessed at 65% disability), and damages were computed by multiplying the disability percentage by a certain amount, in 1984 normally 4,500 DKK.[5] Thus, maximum damages for

[1] *Lov om erstatningsansvar*, Act no. 228 of May 23, 1984. Despite the title the Act does not deal with the basis of liability or with other general conditions for obtaining tort damages, e.g. causation. Ch. 1 of the Act only provides how damages should be assessed when these conditions are fulfilled. Ch. 2 deals with the question of tort liability for damage, other than personal injury, that is covered by insurance, and ch. 3 contains provisions on various other issues, among them mitigation of tort liability and distribution of damages between jointly liable tortfeasors. These parts of the Act, which do not change the state of the law significantly, will not be dealt with in this paper.

[2] *Betænkning 976/1983 om udmåling af erstatning ved personskade og tab af forsørger* (Report no. 976/1983 on assessment of damages for personal injury and loss of supporter—hereinafter cited as *Report no. 976*).

[3] Act no. 79 of March 8, 1978.

[4] Cf. *Betænkning* 679/1973, p. 28, and *Betænkning* 829/1978, p. 62.

[5] At the time of writing (December 1984) 1 US $ = approx. 11 DKK. The average income for an industrial worker in 1984 was approx. 160,000 DKK (14,500 US $).

100% disablement were 450,000 DKK (approx. 41,000 US $); loss of an eye was assessed at 20% disability according to the schedule, yielding 90,000 DKK in damages, and so on. Somewhat lower amounts were awarded in cases where the injured person was very old or had a very low income. Standardization of compensation for loss of supporter had not been carried equally far, but also in these cases the courts seemed to be using a certain maximum amount, which was only departed from if special circumstances indicated that the loss of dependence was much smaller than normal.

Therefore, the basic problem was not the level of damages, but whether the standardized method of assessment should be continued.[6] The level of damages could easily be raised by increasing the amount by which the disability percentage was multiplied. But of course, to the extent that the standardized assessment overcompensated some claimants, a general increase of this amount would also lead to a higher degree of overcompensation. In theory damages for permanent disablement and for loss of supporter—like damages for other kinds of losses—should be assessed according to the individual claimant's economic loss. It was quite obvious, however, that "tort law was not taught low". The standardized method of assessment resulted in a totally haphazard relation between economic loss and compensation, tending to favour claimants whose capacity for work was not reduced permanently—or was only slightly reduced—as a result of the physical disability. Conversely, claimants suffering actual, total loss of earning capacity were undoubtedly undercompensated, even if the degree of undercompensation could only be a matter of speculation. Thus it is likely that the uneven distribution of the tort compensation pool between serious and minor injuries, which has been proved in empirical studies in a number of countries, also prevailed in Denmark, at least in cases of disability. There was no point in discussing whether the courts had imposed some kind of limitation on damages, e.g. a ceiling on the size of income loss that was compensated; nothing in the court practice indicated that the judges even tried to measure individual economic losses, although some judges claimed that they did. Even if the standardized assessment had been developed through court practice, the courts must have felt that there was no way back. Drastic change would require legislative action.

The crucial issue for the committee was therefore whether the theoretical principle of full compensation for individual economic loss should be implemented in rules, governing the assessment of damages for permanent disablement and for loss of supporter. A majority in the committee considered it almost self-evident that this general principle in the law of torts should also

[6] Cf. Bo von Eyben, *Kompensation for Personskade*, Copenhagen 1983, pp. 594 ff. (English summary p. 1042)—hereinafter cited as *Bo von Eyben*.

apply to this area.[7] A minority of the committee—representatives of the Insurance Association—did not agree. On the contrary, they argued that any attempt to implement the theoretical principle of compensation in full should be abandoned, primarily for practical reasons.[8] In their opinion the standardized method of assessment, as developed by the courts, had decisive advantages: The simplicity of the method made it possible for the parties to reach a settlement with a minimum of cost and delay, once the medical condition of the injured person was so stabilized that a disability percentage could be ascertained. The outcome of a lawsuit was in most cases so predictable that there was no reason to take the matter into court. Changing practice would therefore also be to the detriment of the claimants. The court practice should be seen as a pragmatic and realistic acceptance of the impossibility of measuring future economic losses with a reasonable degree of certainty. The uncertain factors were so important that the assessment would tend either to be an arbitrary guess, hindering settlements out of court, or to build on general assumptions about the future development, diminishing in most cases the difference from a standardized assessment. In fact, the minority seemed to prefer no legislation at all. At least they wanted court practice to be able to continue as unchanged as possible, apart from introducing a progressive rate in the amount by which the disability percentage was multiplied, thus raising the level of damages for the most serious injuries.

The argumentation of the committee minority did not fully convince the majority, the Ministry of Justice or the legislature, but it did have some effect on them since the Tort Liability Act, 1984, is clearly an attempt to reach a compromise between the majority and the minority view. The Act sticks to the principle of compensation for individual economic loss, at least as far as damages for personal injury are concerned; it is less clear whether compensation is intended to be in full, but the Act is said to aim at a high degree of coverage of financial losses. On the other hand, compared with the proposals of the majority, the bill contains a number of simplifications designed to meet the objections of the minority. The main purpose of this paper is to examine to what extent the Act is successful in its attempt to make the best of both worlds. The focus will be on the rules governing the assessment of damages for permanent economic loss, i.e. permanent disablement (section 2) and loss of supporter (section 3), but some remarks will also be made on the assessment of damages for permanent non-economic loss (section 4).

However, the question is not only to what extent individualization of damages has been compromised by rules that limit the number of factors to be

[7] Cf. *Report no. 976*, pp. 49 f.
[8] Cf. *ibid.*, pp. 65 ff.

considered in the assessment, thus enabling the parties to reach quick and final settlements. What must also be examined is whether it is feasible to arrange a variety of factual circumstances according to a simple set of rules. Certainly it is possible to make simple rules that fit any case as long as the rules contain nothing but empty generalities, as e.g. a codification of the negligence rule is bound to do. But that of course gives the parties little guidance as to the probable outcome of a lawsuit. Clear-cut and firm rules, on the other hand, may prove to be a strait-jacket for the courts, preventing claimants from recovering damages for items of losses that reasonably should be compensated, or preventing the courts from taking into consideration special circumstances in the individual case which were not—and could not be—foreseen by the statute. Despite the standardization the courts were always in a position to depart from normal practice when reasonable and to award damages without too much speculation about the precise heading. Now they cannot; the Act being exhaustive, damages can only be awarded to the extent permitted by it. The Act does not contain any one general provision to pick up items of losses that fall outside the scope of the various specific headings of damages.

The problem, however, goes far beyond technical questions on how to draft simple rules on complex issues. How and to what extent losses incurred as a result of (certain) accidents should be compensated involves fundamental questions of legal policy regarding the coordination between damages and other kinds of compensation, especially social security benefits and special systems of accident compensation (e.g. workers' compensation and compensation to victims of crimes of violence). The way in which the Tort Liability Act handles this problem is dealt with in section 5, leading to the concluding remarks in section 6 as to what role the Act envisions tort law is to play in the overall system of compensation in the modern welfare state.

2. DAMAGES FOR PERMANENT DISABLEMENT

2.1. *The assessment of damages according to the Tort Liability Act*

For injured persons who were in employment damages for permanent disablement are assessed by multiplying three figures:

(1) The percentage of disablement, measured by the degree of impairment of earning capacity; the impairment must be at least 15% to warrant compensation, and the maximum is of course 100% in case of total loss of earning capacity;

(2) The claimant's gross income from work in the last year prior to the accident;

(3) A capitalization factor, which as a main rule is 6.

Thus, if the injury causes a permanent reduction by 50% of the injured person's earning capacity, and the gross yearly income before the accident was 160,000 DKK, damages for disablement will be:

50/100 x 160,000 DKK x 6 = 480,000 DKK (= 43,600 $)

For injured persons who were not engaged in paid work (i.e. housewives, children and young persons in training) damages for permanent disablement are assessed on the basis of the *medical* disability percentage as in court practice up till now, but the rate by which the disability percentage is multiplied has been changed to an ascending scale, keeping damages on the current level in cases of low disability percentages, but raising the level in the more serious cases to a maximum of 800,000 DKK for 100% disability.

Injured persons with no potential earning capacity before the accident (e.g. old-age pensioners) cannot recover damages for permanent (or temporary) disablement.

2.2. *Assessing the degree of disablement*

2.2.1. "Medical" v. "economic" disablement

Several empirical studies in the Scandinavian countries have shown that the nature of the physical disability, assessed by means of a medical disability schedule, is a poor indicator of economic losses due to permanent impairment of earning capacity.[9] Most injured persons with minor medical disabilities are able to resume normal work a short time after the accident, thus suffering no permanent loss of income. In effect, damages awarded for disablement in these cases compensated for any non-economic loss. On the other hand, injured persons who could not resume normal work because of the disability, in most cases found themselves unable to obtain paid work at all, thus losing their earning capacity completely. Damages for these claimants did not make up for the permanent loss of income, and therefore, in effect, they did not recover compensation for non-economic loss, even if part of the damages was described as such.

Because of the findings of these studies the medical criterion for measuring disablement has gradually been abolished in the Scandinavian countries, in tort law as well as in workers' compensation. It has been retained, however, as a starting point for assessing damages for permanent non-economic loss, cf. section 4 *infra*. The revision of the Danish Workers' Compensation Act in 1978

[9] Cf. *Bo von Eyben*, pp. 650 ff.

followed suit, but as for Danish tort law the courts still adhered to the medical schedules that had been developed under the former Workers' Compensation Act. This combination of individual assessment of permanent loss of income in workers' compensation and standardized assessment in tort law was probably unique. The Tort Liability Act changed that by applying, in principle, the same method of measuring disablement as in workers' compensation. The idea was that the parties should still be able to submit the issue of the percentage of disablement to the Department of Health Insurance that administers workers' compensation insurance. A statement from that Department is not binding on the parties or the courts, but it was presumed that such statements would normally form the basis of the assessment of damages.

Obviously, however, an accurate assessment of the permanent impairment of the individual claimant's earning capacity is not compatible with the desire for expeditious and final settlements. What is interesting, then, are the qualifications made in the test of "economic" disablement to meet that goal.

2.2.2. The time of assessment

In the first place, the Act requires damages to be assessed by the time the medical treatment of the injured person has reached the point where changes in his physical condition are no longer to be expected.

Certainly there are cases in which the injured person's capacity for work in the future can be ascertained at this early stage, either because he clearly will be able to resume normal work or because his physical condition is such that he clearly will be unable to obtain any kind of work. The percentage of disablement in these cases is of course 0 and 100, respectively. But in cases between these two extremes difficulties arise. The injured person may be unable to return to his former job, but through rehabilitation it might be possible to train or educate him to manage some other kind of work. But rehabilitation efforts take time and are normally not initiated before the medical treatment is finished. Experience shows that rehabilitation is often successful when dealing with younger persons, at best resulting in no permanent loss of income. Whether this will be the case is, however, a matter of speculation at the time when damages are to be assessed. In work-related accidents the Department of Health Insurance will make a provisional decision in this case, granting the injured person an interest payment for loss of earnings during the course of rehabilitation and resuming the case for a final decision once the outcome of the rehabilitation is known. In tort law the courts have no such option; thus, the practice of the Department can have no guiding influence on the courts in these cases.

The courts were, however, relieved to some extent from the unpleasant duty

of guessing about the future by an explanatory statement accompanying the Act to the effect that rehabilitation should only be taken into account if it must be considered certain that it will succeed. But *if* it succeeds the effect of disregarding rehabilitation will be to give the claimant a windfall. The case cannot be resumed on the ground that the claimant obtains employment at a later time, not even if he earns the same as he would have earned had the injury not occurred. Thus, the claimant may recover damages for 100% disablement even if he suffers no *permanent* loss of income.

2.2.3. Application of general tort law principles

Uncertainty as to the claimant's future employment situation may be due not only to rehabilitation. Despite recovery from the physical injury, the injured person may have been dismissed from his employment, e.g. because the employer expects him to work less efficiently than before or because a workman with a slight handicap will be one of the first to be fired when business is curtailed. Especially elderly workmen may then find it difficult to obtain other employment, bringing up the rear of the unemployment queue, which, in Denmark, has been quite a long one for the last ten years. Another case is that of an injured person whose capacity for work is impaired though not lost, but who will find few opportunities of utilizing his remaining working capacity, e.g. in part-time employment, because few jobs of that kind are available.

Neither the Act nor the explanatory statements indicate how disablement should be assessed in such cases. Instead the assessment depends on the application of two general principles in tort law: one is that the claimant is obliged to mitigate damages, the other is that a causal relation between injury and loss must be established. Probably no way of drafting the statute could spell out the meaning of these maxims for the guidance of the courts when applying them to individual cases. The courts must try to predict what income the injured person will be able to obtain by "reasonable" efforts to utilize his (remaining) working capacity (the question of mitigation), and to estimate the importance of the injury as a possible obstacle to obtaining employment (the question of causation). The problem for the courts, however, is not only that the assessment necessarily will be conjectural. Also, they will have little guidance in statements from the Department of Health Insurance *if* general tort law principles of mitigation of damages and of causation are to be applied. The practice of the Department—and thus its statements for use in actions for damages—does not adhere to those principles. Instead, the Department tries to isolate the consequences of the injury as a cause of reduced capacity for work, abstracting the assessment from actual labour market conditions.[10]

[10] Cf. Asger Friis & Ole Behn, *Arbejdsskadeforsikringsloven med kommentarer* (Commentary on Workers' Compensation Act), Copenhagen 1984, pp. 259 ff.

Thus, an injured person who is unemployed after finishing medical treatment is normally not paid compensation for disablement, even if he would probably not have lost his job if the injury had not occurred. Similarly, a person who is supposed to have some capacity for work left is not assessed at 100% disablement, even if utilization of that capacity is only a theoretical possibility. These decisions do not reflect an attempt to measure the individual claimant's capacity for work, but rather a general assessment of what he ought to be able to earn, given the injury. In many instances that assessment draws heavily on the degree of medical disability in a way that is contrary to the intention of introducing an "economic" test of disablement. These decisions are based on the notion that the injury must be the sole cause of loss of income, but clearly this notion is inconsistent with general tort law principles of causation, according to which a contributory causal relation suffices. Thus, disablement might well be assessed at 100% even if labour market conditions also contributed to the claimant's being unemployed, provided that otherwise—i.e. if the injury had not occurred—he would probably have been able to keep his job.[11]

In short, the courts face a dilemma: either they can simply follow the statements from the Department of Health Insurance as far as possible, or they can try to implement a truly "economic" assessment of disablement that is more consistent with general principles of tort law. They are most likely to choose the former alternative. The temptation to focus on the medical disability is even greater for the courts, because they are forced to make a final decision at a point where the degree of medical disability may be the only indicator on which to base a prognosis of the claimant's future capacity for work.

Also, the courts might be reluctant to deny compensation to an injured person who has resumed work at the time of assessment, despite some severe physical handicap as a result of the injury. In the long run, however, he may not be capable of keeping his job, e.g. because goodwill from the employer or help from fellow workers may not last forever. If the claimant must give up work at a later time, the case cannot be resumed on this ground; the Act conditions resumption by an unforeseen change of his state of health. But if the courts want to award some compensation in these cases, they will lack an actual reduction of earnings as a basis for the assessment. Also, they will lack guidance from the Department of Health Insurance, because the Department would probably have postponed a final decision due to uncertainty concerning the injured person's ability to maintain paid work. For want of other basis the courts might be expected to use the degree of medical disability or perhaps to

[11] Cf. *Bo von Eyben*, pp. 680 ff.

assess disablement at the minimum of 15%; what else is possible when permanent loss of income is only a potential hazard at the time of assessment?

There is therefore reason to believe that the half-hearted implementation of the "economic" criterion of disablement will not work. In case of doubt concerning what the injured person will actually be able to earn, the courts will probably lean on medical assessments of what doctors think people with a certain handicap should be able to earn. If so, the intended change to compensation for individual, permanent loss of earnings has been substantially modified.

2.2.4. The forum for assessment

Another question is whether the individual method of assessment could have been made workable. The minority of the committee thought not. It argued that individual assessment is inconsistent with the principle that court decisions must be based on allegations and evidence produced by the litigants.[12] The claimant may not be able to estimate what kind of information would be required for the court to reach a decision which awards exactly the amount of damages that the claimant is entitled to. Also, the claimant will be unable to re-examine whether the decision is correct. The outcome of a lawsuit being unpredictable, the parties might either be reluctant to reach a settlement out of court or, conversely, to settle the dispute by relying even more on the degree of medical disability than a court would probably have done.

Though somewhat exaggerated this line of reasoning points to the problem of whether the courts are a suitable forum for the task of assessing damages for personal injury. No doubt, there are some easy cases with a clear-cut distinction between the degree of "economic" and "medical" disability, especially cases where the capacity for work is either lost completely or is unaffected by the injury, while the degree of medical disability falls somewhere in between. In these cases it cannot be denied that the Act brings about a marked change; any authority could handle them. But obviously another inference could be drawn from the scepticism as regards entrusting the courts to practise an individual assessment of damages in less clear cases. If that requires giving the competent authority power to look into the matter itself to gather necessary information, the inference should rather be that such power should be vested in authorities with more expert knowledge in this area than the courts. An obvious alternative would be to utilize the administrative structure of workers' compensation, even if the way in which the Department of Health Insurance has practised compensation for disablement does not encourage the adoption

[12] Cf. *Report no. 976*, pp. 77 f.

of that solution. Of course the practice of the Department would have been amenable to change if the committee had been given the assignment of undertaking a general examination of how "economic" disablement should be assessed, instead of merely asking to what extent tort law could take workers' compensation for a model. The majority rejected an administrative merger of the two systems of compensation simply because of a tradition-bound notion that decision-making in tort law is a main responsibility for the courts—in spite of their dismal performance.[13] But there are other possibilities not even considered by the committee. Decisions on compensation for disablement are made not only by the Department of Health Insurance, but in particular by the County Rehabilitation and Social Pension Boards, which consider the granting of social disablement pensions. These boards and especially the social centres of the county boroughs which prepare the cases for them represent the real expertise on assessing disablement. If use of that expertise could be integrated in some way[14] in the process of assessing damages (damages in tort as well as workers' compensation), better coordination with rehabilitation efforts and social security benefits would be possible and there would above all be a higher degree of uniformity in the assessment of disablement. If disablement caused by an accident entitles the injured person to compensation according to the rules of tort law as well as workers' compensation and a social disability pension, he may be perplexed to find that the same disablement is assessed in three different ways by three different authorities. Especially if rehabilitation is undertaken, the differences will be great, as it is: he will qualify not for a social disability pension but for rehabilitation benefits; he will qualify for provisional compensation for disablement according to the rules on workers' compensation, but compensation will discontinue if rehabilitation succeeds; and finally, a claim for damages can be made regardless of rehabilitation if a successful outcome cannot be expected with "certainty".

It is questionable whether the possibility of making a settlement out of court is all that essential for the claimant. Obviously, it is convenient for the insurance companies, and that may have been the real reason for the position taken by the minority of the committee. The problem is how the claimant can know whether an offer of settlement from the insurance company corresponds to his legal right. Few injured persons hire a lawyer and even fewer bring an action. What matters is an assurance that the injured person recovers damages equivalent to his loss, without his having to prove his case against an adversative tortfeasor or his insurance company and without incurring the cost and the delay of a lawsuit. The tendency to attach greater importance to formal

[13] Cf. *ibid.*, p. 59.
[14] Cf. *Bo von Eyben*, pp. 914 ff.

guarantees for the rule of law in the litigation process, at least in this area of the law, seems less appropriate against this background. The focus should be on the substantive rules, i.e. the criteria for recovering damages, and on ways to insure implementation of those criteria in *all* cases where applicable, in the most expeditious manner for *all* parties involved, including society. One must keep in mind that claimants suffering permanent disablement only make up a small fraction of all injured persons (a few per cent, at most) so that the administrative burden of mandatory public scrutiny of these cases will be comparatively light. The bulk of all claims for damages only involves compensation for temporary loss of earnings and for non-economic losses (medical expenses being covered in most cases by the social security system), and there is no reason to restrict voluntary settlements in these cases; on the contrary, that should be facilitated by a standardized method of assessment of damages for non-economic loss, cf. section 4 *infra*.

2.2.5. Preserving the medical disability test

The adherence to the medical criterion for disability as a method of standardization probably stems from a notion that it makes the assessment objective and fair, treating like cases alike. This notion of justice is, however, just as formal as the reliance on proceedings in courts as the only way to ensure that justice is done. It may be easy for the insurance company to convince a claimant that he is offered the same amount of damages as that received by other people with the same injury, but what should matter is not the similarity of the physical injury but its consequences for the injured person's socio-economic position. In fact, the medical criterion is as arbitrary as any other standard that has no necessary bearing on the size of the economic loss. Equality of treatment is an argument that often fails to explain on what characteristics the comparison should be made.

Nevertheless, the medical method of assessing disability has been preserved in the Act for injured persons outside the labour force. No positive reason for this was given, but only the negative reason that measuring "economic" disablement in these cases causes special difficulties.

As for minors the assessment would often have to be postponed until they reached working age. This is avoided by the assessment of damages on the basis of the degree of medical disability. In most cases, however, this method of assessment leads to an even higher degree of overcompensation than normally, because the younger the claimant is the greater are the possibilities of adjusting education and vocational training to the injured person's physical capability, probably often resulting in increased earning capacity since to make up for the handicap the injured person will receive a higher education than he would otherwise have received. This is another obvious example of standardization at

the expense of the idea of rehabilitation, which so predominates modern social welfare strategy.

As to housewives, the reason for preferring the medical method of assessment was probably the difficulties of measuring—and proving—impairment of the ability to carry out housework. It is true that housewives will rarely qualify for compensation if the "economic" method of assessment applies. Practice concerning the awarding of social disablement pension to married women indicates this because it is assumed that, in spite of a disability, most housework can be carried out with some help from the family.[15] But why relieve especially housewives of the burden of proving a loss? After all, this may also be difficult for other groups, especially self-employed persons. In this way housewives are given preferential treatment compared with married women employed outside the home, particularly in cases of minor disabilities that clearly do not impair their capacity for work, inside or outside the home. The favouring of housewives is most conspicuous in the inevitable borderline cases of part-time employment outside the home, in which she is assessed as a housewife if she works less than half-time but otherwise as gainfully employed. The same is true of students and other young persons in training, who will be assessed in the same way as children if the accident occurs before they have finished education or training, but otherwise as gainfully employed, even if they had not yet obtained work. Odd discrepancies are to be expected between cases close to the borderline in each group.[16] This is perhaps the most obviously unfortunate consequence of the attempt to "make the best of both worlds"—standardization and individualization,[17] indicating the need to make a choice and to implement more consistently whatever is chosen.

2.3. *The gross earnings before the accident*

The next step in the assessment process is to ascertain the claimant's gross income from work prior to the accident. The Act provides that the percentage

[15] Writing on law and economics has suggested that the proper method of assessing damages to housewives is not the value of domestic work, but the value of an alternative use of the earning capacity in paid work, cf. Richard A. Posner, *Economic Analysis of Law*, 2nd ed. Boston-Toronto 1977, pp. 145 f. But it gives no answer to the question of how to establish the value of this "market alternative" if the housewife had never been gainfully employed or had not been so employed for decades before the accident, with no intention or possibility of reentering the labour market.

[16] Cf. Bo von Eyben, *Erstatningsudmåling* (Assessment of Damages), Copenhagen 1984, pp. 133, 173 and 178, and Bo von Eyben, "Lovgivning om erstatningsudmåling", *UfR* 1984 B, p. 101.

[17] Yet not so unfortunate as the proposal of the committee majority that all injured persons suffering some permanent disability should be given a choice between standardized and individual assessment of damages, cf. *Report no. 976*, pp. 63 and 117 ff. This would have turned the assessment into gambling for the claimants, forcing them to guess which choice would yield the greater amount of damages. The proposal would have made the worst of both worlds, except perhaps for lawyers who would suddenly have found ample work giving advice to bewildered claimants about which to choose.

of disablement shall normally be multiplied by the claimant's earnings in the last year. The result should, in principle, be the yearly loss of earnings which forms the basis of capitalization, cf. *infra*.

But actually this figure does not represent the true annual loss. That loss is contained in the degree of disablement, which expresses the expected, permanent reduction of income at the time of assessment. It is superfluous to transform this reduction into a percentage of disablement, and it is wrong to relate the percentage of disablement to earnings prior to the accident, because the potential increase in income in the period from the accident to the time of assessment is ignored.[18] The rule is copied from workers' compensation, which follows the general principles of social insurance. The Act tries, however, to correct the ensuing undercompensation by awarding the claimant interest on the compensation for disablement from the date of the accident. But it fails to do so, partly because the potential increase in income may be higher—or lower—than the rate of interest, partly because income from interest is subject to income tax, whereas compensation for disablement is not.[19]

Generally, the Act completely ignores the problem of taxation. It may seem illogical to assess damages on the basis of the injured person's income before tax, when the compensation, being paid as a lump sum, is exempt from taxation. Spreading the tax load over the relevant period of future income loss may be difficult to accomplish technically, but the problem disappears if compensation is paid as interest, as losses accrue.[20] This argument against lump-sum compensation was not considered by the committee. Evading the problems is of course one way of achieving simplicity.

Another example of this is the fact that no deduction is made for expenses related to the acquisition of income, which the injured person now saves, at least in the event of total disablement. Obviously, it would be difficult to calculate these expenses in individual cases; a standardized deduction would be necessary, but that presents no problem if e.g. it was fixed according to the average earned-income allowance. As to self-employed persons it is evident that gross earnings are not relevant, whereas gross profit derived from the business is, thus allowing for expenses.

Neither was it considered to make deductions for various contingencies, such as the risk of loss of income due to unemployment or disease, perhaps because they were thought to be offset by lost oppportunities of an increase in income due to promotion, and so on. The more likely reason, however, was an over-simplified notion that compensation in full requires 100% coverage of

[18] Cf. *Bo von Eyben*, pp. 692 ff.
[19] Cf. Aharon Yoran, *The Effect of Inflation on Civil and Tax Liability*, Deventer 1983, p. 36.
[20] Cf. *Bo von Eyben*, pp. 695 ff.

income loss. The only explicitly made departure from this principle was the fixing of a maximum of compensable earnings at 350,000 DKK. Very few people earn more than that, thus rendering a ceiling at this level superfluous both from an economic and an equalization point of view. The committee subjected itself to the superficial, yet politically popular idea that high-wage earners should provide for some insurance themselves and so cover their excess losses, though it omitted to ask whether such insurance is in fact available.

Making the injured person's past income a variable in the assessment of damages certainly leads to a far greater degree of individualization than before the enactment. But using this variable is only meaningful to the extent that the degree of disablement corresponds to the actual impairment of earning capacity. If not, the combination of a standardized and an individualized factor in the assessment may lead to damages that reflect individual economic losses even less accurately than they did earlier.

2.4. *Capitalization*

In order to calculate a lump-sum compensation for the yearly, future loss of income, certain assumptions must be made as to the duration of the loss and the rate of interest by which the loss should be discounted to present value. A third factor would be the risk of premature death and other contingencies, but as mentioned above the Act disregards this (except in cases in which the injured person was mortally ill before the accident or died before damages were assessed; however, the Act does not provide how damages shall be assessed in such cases).

As to the duration of loss, the Act generally assumes that the injured person would have continued to work until reaching the age of 67, when he would have qualified for an old-age pension from the state. The claimant can rebut this presumption by proving that he would have remained in employment beyond this age, but that will probably only be possible for claimants who were close to that age at the time of the accident or were in fact employed after reaching the age of 67. Thus, on this point the Act also tries to combine a standardized rule with the possibility of deviation due to individual circumstances. Arguably it fails to give a proper degree of standardization. It is an empirical fact that only manual workers generally retire at the age which the old-age pension system presupposes, whereas salaried and government employees more often retire at the age of 70 and self-employed persons even later. A standardized rule that took this fact into account could be developed;[21] as it

[21] Cf. *Bo von Eyben*, pp. 702 ff.

is, persons who would probably not have retired at the age of 67 will not be fairly compensated if the accident occurs some years before that time. If, on the other hand, the claimant is able to rebut the presumption, the Act does not lay down any rule or guidance as to how damages should then be assessed.

Calculation of the capitalization factor represents a somewhat different problem. Here there is no question of choosing between standardization and individualization; instead, the question is what standard to choose, and this is mainly a question of choosing the rate of interest for the basis of the capitalization factor.

As mentioned above, the Act uses a multiplier of 6 for all injured persons, except for a gradual reduction for claimants who were older than 55 years at the time of the accident. The rate of interest chosen to arrive at this figure was the nominal, effective market rate (the nominal rate of return of long-term bonds), which at the time of passing the Act was 16-17%. To avoid continual changes of the capitalization factor, it was fixed at the rate of interest prevailing at that time.

Using the nominal rate of interest as the basis for capitalization means that damages are not adjusted for future inflation. The part of losses of income attributable to wage increases which the injured person would probably have obtained to compensate for future inflation, is therefore allocated to the claimants. This is clearly an important departure from the principle of compensation in full. It was defended by the committee majority on two grounds:[22] first, it argued that capitalization according to a lower rate of interest would make it possible for the injured person immediately to obtain a higher income than he had before the accident. This is true, but irrelevant; the point is that the compensation should enable the claimant to obtain income equivalent to the one he would have earned in the whole of the relevant period of loss. Of course, the claimant may choose to administer the compensation differently, e.g. by spending it on consumption within a few years. But this is a weakness inherent in the system of compensation as a lump sum, which the committee did not want to change.

More interesting is the second argument that damages would become very large (resulting in increased liability insurance premiums, especially motor vehicle liability insurance), because this argument reflects a certain ambiguity in the attitude towards the principle of compensation in full. The majority stuck to the principle, but turned against its consequences, probably not only because increased insurance premiums would meet with political opposition, but also because it was considered unfair that tort victims should be so favoured compared to victims of other accidents or other social contingencies

[22] Cf. *Report no. 976*, pp. 257 f.

causing loss of income (disease, unemployment, etc.). This is a real dilemma concerning the role of tort damages in the context of the social welfare system. It should, however, be faced openly instead of being suppressed in a hypocritical discrepancy between expressed intentions and actual implementation. Any limitation of damages should be introduced consciously, based on considerations of what part of the losses the injured persons themselves should bear. The implicit choice of the inflation loss has a number of serious drawbacks, the most obvious being that e.g. a 25-year-old claimant suffering a certain loss of income per year, will not recover more damages than a 55-year-old claimant with the same loss per year. It is clearly not reasonable to ignore a difference of 30 years' duration of loss. A far better method of keeping down costs would be to exclude compensation for loss of income and for pain and suffering for the initial period after the accident, e.g. the first few weeks. This way of reducing damages could easily be adapted according to whatever increase of insurance premiums is politically acceptable, and also it could bring about considerable administrative savings by eliminating a large number of trivial claims from the tort system. Besides, allocating part of the loss of short-term incapacity to the claimant instead of part of the loss of permanent disablement would better reflect the reverse priority, rendered by the social security system. Social security benefits cover a temporary loss of earnings far better than they cover permanent disablement (especially partial disablement); thus, the need for tort damages to supplement social security benefits is the greater, the more serious the injury is. In spite of this, the committee passed over all questions of giving priorities, and simply codified the rules governing the assessment of damages for temporary loss of income and for pain and suffering.

It may be true that some people would be offended if tort victims were now to recover damages by the million to make up for their real economic losses. But people generally do not understand the importance of inflation, viewed over a long period of time. Perhaps this has been true of judges as well, but now there seems to be a growing understanding throughout the world—partly from judges, partly from legislators—that inflation cannot be ignored when assessing damages for future loss of income. In a number of countries the discount rate has been reduced by using a "real" rate of interest of—typically—3-4%,[23] i.e. the nominal market rate of interest minus the expected rate of inflation, resulting in capitalization factors of more than 20 for the youngest claimants. One can even discern a gradual recognition that this may not suffice, because the real rate of interest does not account for the rate of economic growth in society, which may totally offset any advantages of the

[23] Cf. Yoran, *op.cit.* (*supra* note 19), pp. 44 ff.

lump-sum payment.[24] In recent years, however, the relation between the rate of nominal interest, the rate of inflation, and the rate of growth has differed widely from that of earlier years; the real rate of interest has been about 10%, and the rate of growth has been only a few per cent. As capitalization of damages for disablement refers to future loss of income, the multiplier must necessarily be a standardized factor in the assessment, predicting the relation between the rates of inflation, interest and growth for up to 30-40 years ahead. Economists will tell that the present relation is not likely to endure, but do they really know? If they are wrong, capitalization by a zero rate of interest (real rate of interest minus the rate of growth) would result in substantial overcompensation—as unacceptable as the undercompensation provided by the Act.

No one has objected to adjustment of compensation to future wage increases when compensation is paid as an annuity (as is the case for workers' compensation if the degree of disablement is 50% or more). On the contrary, keeping the steady value of the annuity according to the average wage trend is considered a prerequisite for accepting compensation as an annuity, even if the costs of adjustment are as great as when future wage increases are included in the capitalization factor. The real issue is simply whether the reserve fund part of the compensation should be administered by the claimant or by the insurance company (under some supervision from the Department of Health Insurance or other social authorities). Experience shows that allowing the injured person to handle a large sum of damages with which to support himself often has unfortunate consequences, because most people are unqualified to make adequate investment decisions. No one has even tried to argue that e.g. motor traffic accident victims in general should be better qualified than victims of work-related accidents. The committee only argued against compensation as an annuity by saying that annual adjustment is technically complicated,[25] without examining whether and how the problem could be solved. Probably, it would be necessary, at least in part, to use a pay-as-you-go system in the financing, in order to avoid restrictive assumptions as to the future development of inflation and wages.[26] This system may cause problems if compensation is paid out of insurance that is not compulsory. Motor vehicle liability insurance being compulsory would be a natural starting point for a reform of tort law, especially because this insurance accounts for about 70-80% of all damages for personal injury.

[24] Cf. *ibid.*, pp. 46 and 174 f. (John D. Fleming on the so-called Beaulieu-rule) and *Bo von Eyben*, pp. 714 ff. In *Report no. 976* only the choice between the nominal and the real rate of interest was considered.

[25] Cf. *Report no. 976*, p. 59.

[26] Cf. *Bo von Eyben*, pp. 813 ff.

3. DAMAGES FOR LOSS OF SUPPORTER

3.1. *The assessment of damages according to the Tort Liability Act*

Damages for loss of supporter to a widow/widower or a cohabitant are assessed at 30% of the damages that the deceased would have recovered if he or she had been totally disabled by the accident. Thus, the rules discussed *supra* regarding the fixing of the gross earnings and the capitalization factor also apply to damages for loss of supporter. Put simply, this means that if the deceased was in employment, damages will be his or her gross earnings multiplied by 1.8 (30% of the multiplier that applies to personal injury). If the deceased was not in employment (housewives, students), damages will be 240,000 DKK (30% of the damages that the deceased would have recovered for 100% medical disability, cf. section 2.2.5 *supra*). If the earned income of the deceased was so low (or if support was based on other income) that damages would be less than 225,000 DKK according to the general rule, damages shall normally be assessed at that amount. Like other amounts stated by the Act, this is subject to annual adjustment according to the average increase in wages.

As to dependent children, damages are normally assessed by multiplying the standard amount for children's allowance by the number of years the child was under 18.

In sum, the Act has opted for a standardized method of measuring dependence. Except for cohabitants, damages are not conditioned by actual support from the deceased, and the actual degree of support (if any) in the individual case is irrelevant. The most standardized award is the assessment of a housewife as a supporter of her husband at 240,000 DKK—no less, no more.

3.2. *Assessing support: legal duty or actual support*

As to spouses and children, a claim for damages is tied up with the deceased's legal duty to support them. To that extent, the dependents automatically qualify for damages for loss of supporter. No question arises as to their ability to support themselves after the death. On the other hand, it follows that the standard degree of support set up by the Act is quite low, resulting in comparatively small compensations. Indeed, in most cases damages will not be much greater than in court practice prior to the Act; e.g. an average income of 160,000 DKK entitles the widow to only 288,000 DKK in damages for loss of supporter. So, a formal criterion of being a supporter is combined with a *relative* diminution of the level of compensation.

The degree of compensation has been taken over from the Workers' Com-

pensation Act, according to which the dependent receives an annuity of 30% of the earnings of the deceased for a maximum period of 10 years. But the annuity is *not* awarded automatically. A spouse is only entitled to compensation if she or he has lost a supporter, i.e. the dependent must be unable to provide a suitable standard of living compared to the standard before the supporter's death. Before the amendment of the Workers' Compensation Act in 1978, compensation to a widow (but not to a widower) was as automatic as the Tort Liability Act now provides. The principle was abandoned because it was considered out of step with changes in the way families are supported, especially the growing frequency of married women employed outside the home. The same development can be discerned within the social security system; recently, the automatic granting of pensions to older widows was abolished when the Social Pensions Act was amended. Thus, a surviving spouse is not entitled to a pension from the state just because of the supporter's death, but only if the spouse is unable to support herself (or himself), owing to failing health or lack of connection with the labour market, and so on.

This tendency to regard widows (and, on equal terms, widowers) as independent persons, who may or may not be in need of support, might have called the very concept of damages for loss of supporter in question. But it did not; there is no reason to believe that the committee deliberately wanted to downgrade damages for loss of supporter. Probably, taking over the degree of compensation from workers' compensation was rather a matter of convenience. Otherwise, the claim for damages should not have been based merely on the death of a spouse.

Quite the opposite conclusion might have been drawn from the fact that both spouses are often able to support themselves. The need for support may be small for this reason, but tort law is concerned not with meeting need, but with covering losses. The fact that the surviving spouse is able to support himself or herself does not necessarily mean that he or she is able to maintain the same standard of living as before the death of the spouse. There is no reason to subject especially damages for loss of supporter to a means test. Precisely because both spouses were employed full-time, there is no way the surviving spouse can mitigate the economic loss—as opposed to e.g. a young widow who can resume work and thereby mitigate her loss, possibly after some occupational training or when she is no longer hindered by taking care of small children. In terms of need there may be no difference between the two cases, but in terms of economic loss there may be all the difference in the world between the family whose standard of living has been based on two incomes, and the family which was supported only by the income of the deceased—or the income of the surviving spouse. This distinction is not made by the Act, and therefore it fails to reflect the fact that the economic loss of a supporter in

some cases is very great and in other cases very small. Making this distinction is of course possible only if one attempts to measure the degree of dependence according to general tort law principles, including that of mitigation of loss. What is interesting, then, is why the committee rejected the making of such an attempt.

3.3. *Measuring the degree of dependence*

The committee argued that the alternative to the proposed, standardized method of assessment would be a completely individual account of the way in which the deceased spouse's income was spent on his or her own personal requirements or on more or less fixed household expenses, such as housing, heating, and so on. The gross loss would then be the difference between the income and the part of it that was consumed by the deceased. To estimate the net loss, any increase in income that could reasonably be required from the surviving spouse (e.g. by taking up some more paid work) should be deducted. According to the committee majority this method of calculating loss of supporter would be impracticable.[27] In a way the minority agreed, but it drew another conclusion.[28] As the variety of individual circumstances could not be incorporated in firm rules, the Act should only indicate what circumstances should be considered, but not how these considerations should be converted into amounts of damages—contrary to the overall goal of making the assessment by the courts predictable for the parties.

The majority stated the alternative method of assessing the degree of support in a way that clearly makes it unacceptable—a well-known trick of argumentation. No doubt, a calculation of the deceased supporter's consumption of the income must be standardized; the problem is only to make the standard as realistic as possible. Assessing damages at 30% of the deceased supporter's income is a kind of standard, presuming that the deceased consumed 70% of the income for his or her own purposes. This presumption is untenable, however, when confronted with statistical evidence of the relationship between income and fixed and variable consumption. According to this, consumption does not increase in proportion to income, and fixed expenses make up a far larger part of the family's overall consumption. Besides, no account is taken of the deceased supporter's consumption of the spouse's income. A more realistic approach would therefore be to calculate, first, the family's total consumption as a part of the spouses' aggregate income, allowing

[27] Cf. *Report no. 976*, pp. 55 ff. and 123.
[28] Cf. *ibid.*, p. 152.

for fixed expenses. A standard for this calculation can be developed without great difficulty, based on results of inquiries into average consumer habits; presumably, the share of variable consumption should consist of a fixed basic amount and a certain percentage of the family income in excess thereof, possibly with some upper limit.[29] Secondly, the amount of variable consumption for the family must be apportioned among the family members. No empirical data exist to indicate how this should be done, but that does not invalidate the method once it is recognized that the shares of consumption must be calculated on the basis of the family's consumption, and not on the deceased spouse's income. If only a spouse or a cohabitant is left, there is no reason to assume that the distribution is not even; if the deceased also leaves children, their consumption share may be fixed at 10% for each child with a corresponding reduction of both parents' shares. The gross loss of supporter for the dependents is then the difference between the deceased spouse's income and his/her consumption share. Once the standards for assessing the family consumption have been determined, the calculation entails no greater difficulties than the traditional method.

The difference between gross and net loss consists of the dependent's duty to mitigate the loss. It is not possible to standardize the deduction to be made for increase in income on the part of the dependent. In principle there is no difference between the duty to mitigate the loss in case of personal injury and in case of loss of supporter. Nevertheless, the Act makes that distinction by disregarding any possibility the dependent might have to replace the support from the deceased with a higher degree of self-support (or even remarriage). The committee majority argued that the low degree of compensation was offset by not deducting (increased) self-support, so that in most cases the standardized compensation would not differ much from an individual assessment.[30] But that is not true. A surviving spouse who is able to mitigate the loss or even to terminate it after a certain period of adjustment will be overcompensated, whereas e.g. an older housewife who was entirely dependent on her late husband will be undercompensated, because not having been employed for years she is unable to mitigate her economic loss. In other words, the effect of the standardization is the same as the one the committee tried to avoid in personal injury cases by replacing the medical disability criterion by the economic disability criterion: claimants suffering small financial losses are overcompensated, while large losses are undercompensated. No reason was given as to why the general principle of the duty to mitigate losses was revoked

[29] For elaboration, see *Bo von Eyben*, pp. 722 ff.
[30] Cf. *Report no. 976*, p. 58.

especially in cases of loss of supporter. Paradoxically, it is precisely the growing frequency of married women employed outside the home that makes it easier to implement this principle. In most cases, neither the widow who was employed full-time before her husband's death, nor the widow who had been a housewife for decades will be able to mitigate their losses. That possibility exists mainly for the spouse who was temporarily without employment at the time of the supporter's death; this spouse may not suffer the *permanent* economic loss that the Act presupposes.

A more realistic way of assessing the degree of support involves other advantages as well. First, there is no need to speculate whether or not the deceased was a "supporter". To the extent the deceased provided a net contribution to the support of others (i.e. the difference between the deceased person's income and share of consumption), he or she *was* a supporter, irrespective of any legal duty to support them. The Act complicates the issue, both in cases of cohabitation and in cases of married couples. According to the Act, one has to decide whether a cohabitant was a "supporter"; if that is the case, damages must be assessed according to the general rule, leaving no room for taking the degree of support into account. Probably, this consequence will influence the deliberations of the courts as to the supporter status of the deceased cohabitant. As to spouses, it was realized that there may be cases where the deceased provided little or no actual support. The Act provides that this must be taken into consideration, but it fails to indicate how damages are then to be assessed. These problems would not arise if the starting point was a refined method of measuring actual support instead of a predetermined concept of what constitutes the status of being a supporter.

Secondly, the alternative method automatically solves the problem of measuring the extent of support of children. The Act lays down another standard, which is known to underestimate the true, average expenses of supporting a child. Perhaps this is why these damages are in fact discounted by a zero rate of interest. Because of the difference in the principles of discounting, however, damages to children for loss of supporter will often be out of proportion to damages to a dependent spouse. The Act seems to postulate that the support of children is always at the expense of the share of consumption of the deceased only—which, of course, is absurd.

Thirdly, the Act provides no rules for losses incurred by other dependents than spouses, cohabitants and children. Only the explanatory statement accompanying the Act reveals that it is not meant to be exhaustive, but it does not reveal how damages are to be assessed in cases not governed by the Act. Also, it is unclear how the discretionary power thus given the courts is to be combined with the rigid set of rules laid down by the Act. According to the rules, e.g. a surviving spouse of an old-age pensioner is never entitled to

compensation for loss of supporter.[31] Certainly, the economic loss is small in such cases, but some loss will be suffered, even if the surviving spouse also receives a social pension, precisely because of the importance of fixed household expenses. In all probability, the courts will be reluctant to accept the harsh consequences of strictly adhering to the general rules. Similarly, they may be expected to use their discretionary power to avoid the otherwise required, clear-cut distinction between cohabitants who are "supporters", and cohabitants who are not. If so, the seemingly simple rules are blurred, rendering court decisions unpredictable, at least until a pattern of judgments awarding damages materializes—and that may take years. Part of the problem could have been solved if damages for loss of supporter had been supplemented with a so-called "transitional sum" (known from workers' compensation), i.e. a fixed amount of damages awarded any dependent spouse or cohabitant to cover various extra expenses in connection with the death.

4. DAMAGES FOR NON-ECONOMIC LOSS

Assessment of damages for non-economic loss also implies the choice between an individual and a standardized method. However, in this area some standardization is necessary because it is not possible rationally to argue how the damage should be converted into an amount of compensation. Instead, the problem is to what extent individual circumstances should be taken into consideration when assessing the non-economic consequences of the injury (the pain and suffering, disfigurement, loss of capacity to enjoy life, and so on).

The Act distinguishes between temporary non-economic loss ("pain and suffering") and permanent disability. Both items are characterized by a high degree of standardization—in the sense that the damage must be assessed by means of a few, objective criteria. As to pain and suffering, the sole criterion is the duration of the illness that entitles the injured person to a certain amount of damages (currently 100 DKK) for each day he is confined to bed, and half that amount for other days on sick-leave. As to permanent disability, damages are assessed by multiplying the percentage of medical disability by a certain amount (currently 2,000 DKK). The amounts specified by the Act are subjected to annual adjustments according to the average wage increase.

Whether the level of damages is reasonable is a matter of opinion and cannot be approached by rational argumentation. Of course, it can be noted that the level is quite low in an international comparison of law, and also that it does

[31] Cf. Bo von Eyben, *Erstatningsudmåling* (Assessment of Damages), Copenhagen 1984, pp. 197 f. and p. 213.

not reflect the "leisure time society" that we are said to be entering. At any rate, it is difficult to understand why damages for permanent disability in most cases will be lower than damages according to the Workers' Compensation Act. Equally irrational is the fact that this Act does not provide for damages for pain and suffering.

There is no question, on the other hand, of the advantages of simplicity in the assessment. Most claims, involving damages for non-economic loss (and many claims involve no other damages), can be disposed of very expeditiously with a maximum of assurance that all tort victims are treated equally and fairly without taking the matter into court. Besides, the Act sticks to customary ground, the rules being in continuation of the principles developed in case law.

The problem is only whether the assessment has become *too* simplified.[32] The standard amounts for pain and suffering can never be deviated from as long as damages do not exceed 15,000 DKK. The way of assessing permanent disability is closely attached to the rules in workers' compensation, where the medical disability schedule is only deviated from if the injury involves special inconveniences in the daily life of the injured person.[33] However, not even in this respect are the courts obliged to follow the practice of the Department of Health Insurance, and they may well be tempted to apply a more discretionary assessment and consider the actual importance of the injury to the individual claimant's leisure time activities and other ways of enjoying life. The committee only expressed an expectation of what the courts will do (namely,"normally" to follow statements from the Department of the degree of disability), not an opinion of what they ought to do.

A related problem, similarly unresolved by the committee, is whether and how damages can be awarded for various extra costs which the injured person is likely to incur in connection with the disability, but which cannot be substantiated in such a way that a specific claim for damages can be made. In Sweden, some uncertainty has emerged as to the proper application of damages for so-called "other inconveniences",[34] a heading not used in the Danish Act; however, the Danish Act does encompass an unspecified coverage of "other losses" (than loss of earnings and medical expenses), which may be used to pick up losses not otherwise recoverable. However, an interpretation of the words as liberal as this is hardly compatible with the intention of the committee, which aimed rather at providing damages for expenses incurred in

[32] See Arya L. Miller,"Should Social Insurance Pay Compensation for Pain and Suffering?", 31 *International and Comparative Law Quarterly*, pp. 565 f. (1982).

[33] See Asbjørn Kjønstad, "Assessment of Disability", 26 *Sc.St.L., pp. 126 ff. (1982)*.

[34] "Olägenheter i övrigt", see discussions by Birger Höglund in *Nordisk Forsikringstidsskrift* (Scandinavian Insurance Quarterly) 1984, pp. 71 f., Ola Pettersson in *SvJT* 1983, pp. 106 f., and Ulf K. Nordensen in *Festskrift till Jan Hellner*, Stockholm 1984, pp. 404 ff.

the period immediately after the accident and for future medical expenses. Thus, damages cannot be awarded under this heading for individual inconveniences which supposedly will entail some extra expenses in the future. Any such relief of the claimant's burden of proving his loss would only be possible if the heading was damages for non-economic loss (as is the case in Sweden), e.g. by attaching the assessment to the inconvenience as such, leaving it to the injured person to decide whether he will tolerate the inconvenience and use the damages for other pleasures, or spend the damages on appliances that can reduce the inconvenience. But there is no such heading of damages in Danish law. If the courts choose to take such contingencies into account by deviating from the medical assessment of the disability, the system of scheduled compensation for disability is undermined. If they do not, damages in the borderland between economic and non-economic losses may go uncompensated.

5. COORDINATION BETWEEN SOCIAL SECURITY AND ACCIDENT COMPENSATION

In Sweden and in Norway all benefits from the social security system are deducted from the damages if they cover the same losses for which the claim is made. Thus, e.g., the social disablement pension is deducted when computing damages for permanent loss or impairment of earning capacity. In other words, tort damages merely supplement the general social security system, covering the net economic loss (and, of course, non-economic loss) that remains due to limitations and qualifications laid down for the various social security benefits.

This is not the position in Denmark. Health insurance benefits, sickness benefits and workers' compensation benefits are deducted, but pensions according to the Social Pension Act are not. The reason for this was partly the general wish to simplify the assessment of damages for disablement and loss of supporter, partly the fact that social pensions are income-related so that the compensation and interest earnings thereon will reduce the amount of the pension. Obviously, the injured person would be undercompensated if the full pension was deducted from the damages and the residual damages were then deducted from the pension. On the other hand, solving the problem by way of ignoring it may lead to overcompensation, depending on how the injured person spends or invests the compensation. The lack of rules governing the coordination implies a completely haphazard relation between the economic loss and the total compensation. The most simple way of avoiding this would be to award damages as an annuity, setting off the difference between the loss

of earnings and the pension.[35] However, not even the Workers' Compensation Act applies this method; instead, a special deduction is made from the social pension because of the annuity compensation, but that also was fixed arbitrarily.

It might have been argued that it is better to let damages reduce the social pension than doing the reverse, because as much as possible of the total compensation should derive from the accident compensation system and not from the social security system. Otherwise accident costs will be "externalized" because costs are covered by contributions from the taxpayers, not from tortfeasors or—rather—by way of insurance premiums from groups of potential tortfeasors who engage in the activity by which the accidents are caused (e.g. motoring). Economists argue that subsidizing accident-prone activities in this way is undesirable, leading to a distortion of the allocation of resources in society.[36] The idea of deterrence is thus expressed in a more sophisticated and, arguably, more realistic way, even if the deterrent effect of liability rules is still a matter of speculation, and is not substantiated by empirical evidence.

However, economists do not tell us how subsidizing should be avoided, given the fact of a highly developed social welfare system. Accident victims who are entitled to tort damages cannot be denied access to the general social security system because if they were they would be worse off initially than victims of other accidents and disease. The reimbursement of social security benefits once the injured person recovers damages is as inefficient and difficult to administer as rules of recourse against the person liable in damages, which for this reason have been repealed gradually in all the Scandinavian countries. A far more efficient method of "internalizing" accident costs would seem to be the duty imposed in 1975 on motor vehicle liability insurance premiums, at the rate of 50% of the premium. Allegedly, the duty should cover all expenditure by the state arising from motor traffic accidents, including the costs of hospital treatment and of disablement pensions to victims of traffic accidents.

Now, the problem is that the expenditures connected with disablement pensions will go down because larger amounts of damages entail greater deductions, and that the revenue from the duty will go up because liability insurance premiums will be raised to cover the increased level of tort damages! In effect, motorists are required to pay twice for some of the costs of disablement, and therefore they argued that the rate of the duty should be reduced. But, not unexpectedly, they argued in vain; the state needs the money. This is a striking illustration of the fact that politics, not economics, decides the allocation of accident costs. The lesson to be learned from this is not that the

[35] Cf. *Bo von Eyben*, pp. 856 ff.
[36] See, e.g., Guido Calabresi, *The Costs of Accidents*, New Haven-London 1970, pp. 6 f. and 144.

internalization of accident costs is undesirable, but that it will always be a matter of degree, and that the actual degree will be determined by some more or less arbitrary, political decisions.[37] Full internalization of all social costs of all kinds of accidents is utopian, at least in combination with the traditional systems of accident compensation—and no other suitable systems have been envisioned. It seems preferable, therefore, to accept the basic coverage of losses by the social security system without attempting any secondary shifting of costs, so that accident compensation does not replace social security benefits, but merely supplements them to whatever degree of total compensation is decided on. Some 15 years ago one would have expected this area for accident compensation to diminish gradually, but recent curtailments of various social security schemes have clearly demonstrated that accident compensation is not going to be phased out in the foreseeable future. If accident compensation had consistently been structured as a supplement to the social security system, it would automatically be adjusted to the future development of that system, whether the present trend continues or economic growth enables new expansions.

6. CONCLUSION

It is difficult to deduce any overall attitude towards tort law as a system of accident compensation from either the Act or the committee (despite 17 years of deliberations). The issues of legal policy involved on the whole boiled down to the question of how to increase the level of damages especially in cases of serious disablement. The proposals did not depart so much from well-established methods of standardized assessment as to rouse serious opposition from judges' and insurance associations. Also, the extent to which the assessment would still be standardized was calculated to obscure the issue of whether compensation is to be in full. Apparently, the politicians only paid attention to the fact that severely injured persons would recover larger amounts of damages, without any significant increase in liability insurance premiums (possibly with no increase at all, as claimants suffering only medical disability would recover smaller amounts of damages than before), and certainly without any increased taxation. Any such bill is almost bound to be passed unanimously. During the legislative work only some (but not all) technical defects of the bill were corrected; there is no hint of any discussion or even consideration of the role which the Act assigns to tort law as an instrument of accident reparation.

[37] Experience from the New Zealand Accident Compensation Act confirms this point, cf. *Bo von Eyben*, pp. 996 ff.

The most important question of legal policy involved is, of course, the range of application of the Act, i.e. by what accidents injured persons are entitled to damages in the first place. There is no doubt that recovering damages in some areas must still depend on traditional tort liability rules, but there is equally no doubt that in other areas tort liability will be replaced by special insurance schemes, covering well-defined groups of accidents causing personal injury according to objective criteria. The question is whether legislation now, dealing only with the assessment of tort damages, paves the way for or stands in the way of a future development along these lines. Workers' compensation is of course the prime, existing example of a no-fault insurance scheme, disengaged from the notion that the awarding of damages must depend on someone being personally liable for the accident. The development in Denmark of new accident compensation schemes has been characterized by a random choice between the rules governing workers' compensation (e.g. the Vaccine Damage Act, 1972) and the rules of assessment in tort law (e.g. the Criminal Injuries Compensation Act, 1976). What is increasingly needed is a harmonization between no-fault insurance schemes, tort law and other systems of accident compensation,[38] so that any future development does not involve new, more or less arbitrary choices between different levels of compensation. To accomplish this, piecemeal reform of the accident compensation systems one by one is not the way. That would only make the reform work endless, because each reform inevitably has consequences for other parts of the accident compensation system.[39]

Therefore, the starting point should have been the existing differences between workers' compensation and tort damages, some of which have been noted above. Straightening out these differences, based on a general aim at one, overall level of accident compensation,[40] should have been the task. Evading it now will cause greater problems later because decisions of the level of compensation are in practice more prejudicial than most other decisions of legal policy. That does not seem to have troubled politicians, who have contented themselves with the committee's conviction that the Act is a step in the right direction. But how can anybody tell that he is taking that step, when he does not know where he is going?

[38] The proposals put forward by the British *Pearson Report* (Royal Commission on Civil Liability and Compensation for Personal Injury, Cmd 7054 I-III, London 1978) would not bring about such harmonization and would uphold the differences between no-fault compensation and damages according to the rules of tort law.

[39] A good illustration of this is the proposed amendment of the Criminal Injuries Compensation Act due to the enactment of the Tort Liability Act; see Bo von Eyben,"Erstatning til voldsofre—forholdet til erstatningsansvarsloven" (Compensation to victims of crime—the relation to the Tort Liability Act), *Juristen* 1985, pp. 72 ff.

[40] Cf. Jan Hellner,"Social Insurance and Tort Liability in Sweden", 16 *Sc.St.L.*, p. 197 (1972).