ADDITIONAL COMPENSATION ON ACCOUNT OF UNFORESEEN DEVELOPMENT OF DAMAGE

BY

BO VON EYBEN

© Stockholm Institute for Scandianvian Law 1957-2009

1. FRAMING THE PROBLEM

Ever so often it happens that the effects of a damaging act, or of some other event giving rise to a claim for compensation, are not exhausted at the time when the compensation is fixed. Conceivably one may not have been aware of the possibility of additional damage occurring, or one may have figured that all damaging effects *had* occurred. It is also possible that at the time when compensation is fixed it does appear reasonably certain, or at least likely, that further damage will occur, so that the fixing of compensation actually includes future effects, or possibly the mere risk that they may occur. Finally, it is also conceivable that when compensation is being computed it appears so uncertain whether any future damage will actually occur or, if so, what its extent may be, that one prefers to postpone the final fixing of compensation.

Where a decision appears to be final, the issue arises precisely what does "final" involve in situations where the assumptions regarding any future damage or its extent prove to be incorrect. Does the party entitled to compensation have an additional claim where the future effects of the damage turn out to be more extensive than envisaged at the time of fixing compensation? Is the party liable—or a party otherwise paying compensation—entitled to a reduction in compensation where the effects turn out to be less extensive than envisaged?

Particularly in Danish law, this problem has been raised in connection with compensation for personal injury where the permanent effects of the injury prove more extensive than assumed at the time when compensation was fixed. The issue is elucidated through a rich judicial practice, a considerable amount of legal theory, and now also explicit legislation. In Danish law less attention has been paid to the corresponding problem of damages for activities polluting the environment, be it that future damaging effects—as in the case of personal injury—have been caused by a specific damaging event, or that they are a consequence of an activity causing continuous pollution or nuisance which the injured party is obliged to tolerate. The problem may also arise where the event giving rise to a claim for compensation does not involve any damage but consists of an expropriation. Finally, the problem may occur within the context of insurance law. The parallel with the classic

© Stockholm Institute for Scandianvian Law 1957-2009

problem of the law of tort is most distinct in cases of personal insurance, in particular private accident insurance; but, not the least, additional compensation in cases of delayed effects of damage to the environment may also give rise to the issue of whether and how such damage can be covered through liability insurance. In recent years more attention has been paid to these problems, particularly in Norway and Sweden.

It is normally underlined that the problem involves issues of substantive law as well as of procedural law. Where compensation has been fixed by a judgment the procedural issues involve, *whether* the case can be resumed, *whether* the conditions for fragmentation are fulfilled, and *whether* the decision is legally binding, particularly in the sense that new cases regarding the issue settled shall be dismissed. The relation between substantive law and procedural law does not appear to be a problem in relation to fragmentation. It is generally acknowledged that a creditor (the injured party), particularly in the case of personal injury, has a certain possibility of dividing his claim, and that procedural fragmentation of a claim must be recognized to the same extent. The relation between the doctrine on the binding force of judicial decisions and the substantive law rules governing the significance of conditions changing subsequent to the decision, appears more nebulous. Failing any statutory provisions on the substantive issue, the problem is normally seen as purely a procedural one which *may* lead to the following conclusion: if a judgment has taken a position on the issue of compensation for future damage, this issue cannot be tried in a new case even if the situation develops unexpectedly, regardless of whether the judgment assumed that no future damage would occur or whether its assumptions as to the extent of any future damage appear incorrect. If the judgment is to be contested, it will have to be on the basis of the rules on resumption which, however, normally operate with qualified conditions and possibly also special time limits. Based on this conception it becomes decisive whether the injured party made it perfectly clear during the case that a decision was desired merely on that part of the claim for compensation which could be presented, i.e. that an explicit reservation was made on fragmentation of the claim.

As will appear, the attitude, particularly in Norwegian law, is marked by this approach just as was the case in Swedish law prior to the substantive law codification introduced by the 1972 Tort Liability Act. But having a regulation in substantive law does not necessarily resolve the issue. No statutory provisions existed in Danish law until the introduction of sec. 11 of the 1984 Damages Liability Act, but this provision merely codifies the possibility of renewed trial where conditions have changed; yet this possibility has been accepted all along, in procedural

© Stockholm Institute for Scandianvian Law 1957-2009

law as well, even where the conditions for resumption are not fulfilled. However, in one major respect the provision also *limits* the possibility of judicial review by prescribing special requirements as to *what* circumstances must have changed. In other words, a codification of substantive law does not necessarily—as happened in Sweden—involve a greater possibility of judicial review by abolishing restrictions framed in terms of procedural law.

Where a settlement has been reached on the amount of compensation to be paid, which is most often the case in practice, the parallel to the issue of substantive law versus procedural law lies in the problem of whether a contestation of the settlement should be treated exclusively as a question of contractual law. If so, the problem is primarily one of interpretation of the substance and scope of the settlement and, possibly, invalidity under general rules of contractual law or, particularly regarding the relevance of changed conditions, a contestation of the settlement on the basis of the principles of changes in implied conditions. Regulation of the substantive law does not do away with the contractual law problem but gives it a certain twist since the issue then becomes whether the parties in their settlement may agree upon a wider or—in particular—a narrower possibility of resumption than the one open under the rules of substantive law, i.e. whether these rules are mandatory particularly in relation to the injured party and, if so, precisely what this involves.

A general thesis on this would run as follows. In general there should be a possibility of renewed review if changes subsequent to the decision were not, or could not have been, anticipated when the decision was made and which considerably change the assessment of future effects of the damage on which the decision was based. This right of renewed review should be independent of whether the decision was made as a judgment or as a settlement. It should not be a condition that a reservation was made in reaching the decision, and in general it should not be possible to agree on any limitations upon the right.

These theses have been framed with special reference to the problem in relation to personal injury. One may thereafter discuss whether they may be used correspondingly, partly where the type of injury is different, partly where the basis for a claim for compensation does not consist in tort but in an insurance event or in expropriation.

The theses do not, however, give much guidance on the extent of review. Their actual significance will depend upon many factors. The rules on fixing compensation become relevant in themselves, particularly in the extent to which they aim at a precise measurement of the individual loss in case of future damage. The way compensation is paid,

© Stockholm Institute for Scandinavian Law 1957-2009

i.e. as a lump sum or as a current payment, is particularly relevant in relation to the issue of whether a review may be based upon a more favourable, as well as upon a less favourable, development of damage than what was envisaged. Here it is also relevant *whether* there is a possibility of making a preliminary decision, *whether* the decision may take, and has taken, into account the *risk* of additional future damage, and *whether* a requirement for "major" changes shall be seen in the light of this. Finally, it might make a difference whether a change includes the extent of the physical damage, or whether it refers exclusively to its financial consequences.

2. BALANCING OF INTERESTS

The basic conflict naturally lies between the consideration that damages should compensate the loss actually suffered and the consideration that at some stage the parties should be able to adapt their situation to the issue of damages finally decided. If individual loss constitutes the criterion for fixing compensation for future damage—as when compensating a loss already suffered—it appears unsatisfactory if compensation cannot be adjusted where the actual effect of the damage develops entirely differently from what was considered most likely when compensation was fixed. This should be balanced against the interest of the parties in being able to consider the matter finally concluded, so that they are secured against the risk of being met with later claims which will give rise to constantly increasing evidential difficulties, particularly regarding the causal link to the original damage. More general interests, among others the costs of court actions, also favour a main rule that the fixing of compensation for future damage should be a final one. Thus, we are faced with considerations of the type which may otherwise result in rejection of subsequent payment or of seeking repayment where an "original" statement of the parties' account has been erroneous, and which also underlie the rules on passivity, limitation, etc.

Few would seriously advocate entirely avoiding the problem by making the fixing of compensation into a process as continuous as the effects of the loss. Even those who favour a system of current payment of compensation accept that, at some point, a decision must be reached which has a certain finality. But this type of compensation obviously presents better possibilities of adaptation to changed conditions than where compensation, including compensation for future damage, has been fixed as a lump sum. This is not the place to discuss whether *that*

© Stockholm Institute for Scandianvian Law 1957-2009

constitutes an advantage or a disadvantage. Suffice it to note that legislation in the field of personal injury has adopted the traditional difference between Finland and Sweden (current compensation in certain cases) and Denmark and Norway (always a lump sum). Where compensation is given as a current payment, the possibility exists of subsequently making a reduction which takes effect only in relation to future payments, just as in the case of social security benefits. A subsequent reduction of a lump sum will, however, be tantamount to a claim for repayment of part of a compensation already received, and possibly used. The fact that one will often have adjusted one's situation is an argument of special weight against this type of revision. It is, therefore, a general principle that no repayment can be claimed from the injured party merely because the effects of damage develop in a way more favourable than envisaged.[1] This special limitation upon the possibility of taking changed conditions into account is thus based upon the way in which compensation has been paid and not upon the nature of the damage or the encroachment.[2] The situation is different where the assessment of the extent of future damage is based upon erroneous grounds for which the injured party is responsible. Here the rules (of procedural law) on resumption may be applied.[3] An example from Norwegian judicial practice is 1959 Rt 1073. This concerned resumption of 1956 Rt 605, which had granted the injured party compensation for close to 100% disablement but where the injured party had concealed the fact that he had sought and obtained new employment. It was, however, merely employment on a trial basis and would not "obviously" have had any influence upon the fixing of compensation, cf. sec. 407, subsec. 6, of the Administration of Justice Act. The judgment is a crucial one, because the *travaux préparatoires* to the Norwegian Damages Liability Act intend to limit the possibility of review precisely to such situations.[4]

[1] Cf. e.g. *SOU* 1973:51, pp. 162 and 312, *Prop.* 1975:12, p. 119, H. Saxén, *Skadeståndsrätt*, Turku 1975, p. 297, and U. Nordenson *et al.*, *Skadestånd*, 2nd ed. Stockholm 1977, p. 204.

[2] Cf. e.g. on pollution damages, *NOU* 1982:19, p. 154, and on expropriation, O. Friis Jensen, *Taksationsproces*, Copenhagen 1975, p. 212.

[3] Cf. the commentaries on sec. 11 of the Damages Liability Act, *Folketings Tidende* 1983/84, part 2, app. A, col. 97.

[4] Cf. *Instilling fra Erstatningslovkomitéen* 1971, p. 42. There are examples in older Danish judicial practice of the rules of resumption (now sec. 399 of the Administration of Justice Act) having been applied, cf. 1931 UfR 1028 (Supreme Court) and *Bet.* 976/1983, pp. 212 ff., but later practice has not felt bound thereby, cf. on this point P. Spleth in *Juristen* 1966, pp. 142 ff., as for Swedish law cf. P.O. Ekelöf in *SvJT* 1974, pp. 687 ff.

© Stockholm Institute for Scandianvian Law 1957-2009

Where compensation for future damage has been fixed as a lump sum the issue of the relevance of changed conditions is consequently limited to cases of deterioration. The interest of the injured party in being able to invoke a deterioration as a basis for an additional claim is obvious. Special weight is normally put upon the interest of the injured party in cases of (serious) personal injury, but quite as often it is argued that, particularly in such cases, final settlement is of special importance. Otherwise there is a risk that the attention of the injured party may become morbidly fixed upon the issue of compensation ("compensation neurosis") which in itself may prevent the best possible use of remaining working capacity. A major part of Danish judicial practice regarding resumption deals precisely with posttraumatic neuroses.[5] Experience indicates that such neuroses normally disappear when the case is concluded by payment of a certain minor compensation (for instance for permanent injury) thereby making it possible for the injured party to concentrate on using his working capacity. But this is not always the case; the neuroses may develop into a more comprehensive mental disease which actually reduces the working capacity, and precisely such a deterioration may give rise to a claim for a renewed review, cf. e.g. 1950 UfR 996 (Supreme Court).

The argument that a review is not even in the interest of the injured party is frequently valid only in cases where the situation changes for the better.[6] Considerations of rehabilitation etc. obviously act against a review, but as previously mentioned the decisive impediment lies in fixing compensation as a lump sum. The consideration of adapting oneself to the situation cannot be invoked with equal strength in favour of the liable party.[7] It occurs so rarely that those liable personally fulfil a claim of damages, particularly in cases of serious personal injury, that it does not appear reasonable or realistic to draw parallels between the two problems. It is also recognized that where compensation is given as a current performance, more is needed to reduce the compensation than to increase it.[8] The opposing interests which here collide are those of the injured party in obtaining compensation for subsequent addition-

[5] Cf. regarding practice (prior to the Damages Liability Act), Stig Jørgensen, *Erstatning for personskade og tab af forsørger*, 3rd ed. Copenhagen 1972, pp. 446 ff., *Bet.* 976/1983, pp. 212 ff., and Bo von Eyben, *Erstatningsudmåling*, Copenhagen 1984, p. 232.

[6] Cf. as an example particularly *Instilling fra Erstatningslovkomitéen*, pp. 41 ff.; reference is also made to Saxén, *op.cit.*, p. 232.

[7] Cf. *Instilling fra Erstatningslovkomitéen*, p. 42.

[8] Cf. regarding Swedish law, *SOU* 1973:51, pp. 164 and 313, and *Prop.* 1975:12, pp. 80. 118 and 171; apparently the situation is different under Finnish law, cf. Saxén, *op.cit.*, p. 299.

© Stockholm Institute for Scandianvian Law 1957-2009

al loss and those of the liability insurance company in being able to "close" a case which has been decided by a judgment or a settlement. The consideration to be given the paying party is entirely different for instance in case of paying maintenance; but there payment is on a current basis so that practical possibilities of a subsequent adjustment, in particular a reduction, are far greater. The interest of insurance companies in being able to conclude a case of damages fairly quickly is reflected in the typical policy terms of accident insurance, cf. below. Liability insurance would, however, not be able fully to meet its purpose, if its coverage timewise was more narrow than what follows from the rules on limitation.

From both the substantive and the procedural point of view, legal rules should naturally encourage the fullest elucidation, during the case, of the extent of a possible future loss. Known or probable future effects of the damage which could have been taken into account should not justify a resumed review. But this does not justify excluding a review of unforeseeable subsequent effects which, if known, would have had a bearing upon the compensation for future damage.

In other words, the extent to which there is a need for a renewed assessment depends largely upon the extent to which compensation for future damage claims to be based upon a detailed concrete assessment of all facts presumed to be relevant to the extent of any future damage and the amount of individual loss incurred thereby. The more one aims at implementing the principle of compensating individual economic loss even in relation to future damage, the more unsatisfactory it appears if a renewed assessment is refused where conditions have changed and, correspondingly, a greater number of conditions become relevant. If for example a compensation for disablement is fixed exclusively on the basis of medical criteria, it is irrelevant whether the injured party's earning capacity turns out to be poorer than envisaged when the case was decided. If, however, compensation is fixed on the basis of a concrete prediction regarding the injured party's future earning capacity, changes not only in his health but also in his working situation etc. may become relevant.[9] Where compensation for a future loss, or a reduction in working capacity, is fixed in such a way that disablement pensions and the like are deducted, any future changes regarding the size of the pension may make the issue of a renewed assessment acute.[10]

[9] Cf. *SOU* 1973:51, pp. 161 ff.

[10] Cf. e.g. on Swedish law, *Prop.* 1975:12, p. 128, and Bo von Eyben, *Kompensation for personskade* I, Copenhagen 1983, p. 847.

© Stockholm Institute for Scandianvian Law 1957-2009

If on the other hand—as is the case under Danish law—social disablement pensions and the like are not taken into account when fixing compensation, any changes in pension naturally become irrelevant. Should a compensation for loss of future income—as under Norwegian law—explicitly include a separate amount covering the "tax disadvantage" (i.e. the capital tax which the injured party has to pay on lump-sum damages and the income tax to be paid on what is derived therefrom) one also runs the risk that subsequent amendments to tax legislation upset the calculation underlying the assessment of damages. A recent Danish tax reform, for instance, considerably reduced taxes on interest income. In such a situation, should one (if lump-sum damages were no impediment) resume *all* cases which had been decided on the basis of the former rules of taxation? Clearly, a renewed assessment as a consequence of changes in all facts of a "general" nature which may be relevant to the amount of the loss suffered, may have very far-reaching consequences. But it is equally obvious that limitations upon the possibility of reassessing "individual" changes may lead to arbitrariness. There is, for instance, no doubt that business conditions in general, or at any rate in the injured party's sector, may greatly affect the extent to which physically disabled persons may obtain or retain gainful employment.

Faced with these possible consequences it is, from a legislative point of view, understandable if one prefers a certain standardization of the factors taken into account in fixing compensation for future damage, so that they are either completely fixed according to the circumstances obtaining at the time of the damage or of deciding the case, or are framed with a margin for the uncertainty necessarily involved in any prediction regarding future development, in such a way that a renewed assessment is primarily or exclusively permitted in case of changes referring to the extent of the physical damage (in other words—in personal injury cases—particularly a deterioration of the injured party's general health). The greater the margin of uncertainty regarding the future development, the greater the deviation from the most likely development must be in order to justify a renewed assessment. It would be meaningful to frame this as a requirement that a change must be an essential one.[11] Particularly in cases of personal injury the issue therefore becomes largely whether, and how far, a computation of compensation for future damage should take into account a margin for the risk

[11] Cf. hereby *SOU* 1973:51, p. 165, and *LU* 1975:16, p. 29.

© Stockholm Institute for Scandianvian Law 1957-2009

of subsequent deterioration. The injured party should not be awarded *both* a compensation for the risk of additional damage *and* a supplemental compensation if and when the risk becomes a reality. Balancing the rules on computation of compensation between these two principles consequently decides the true substance of a requirement regarding "major changes". This requirement is not identical to the procedural law requirement for resumption of a case.[12] To this should be added a reluctance to withdraw the possibility of a trial of the new claim before two instances, particularly when it is assumed that the original decision is not binding as far as its position on the issue of the basis for liability etc. is concerned.[13]

Although the need for meeting the interest of an injured party by allowing a renewed assessment where conditions deteriorate is thus particularly evident in cases of personal injury, there is just as much hesitation in this very area, partly because the situation may deteriorate precisely on account of the additional proceedings or the mere possibility of resumption, partly because the assessment of future loss is influenced by so many factors that it may be difficult in practice to delimit those which should justify a renewed assessment. It may perhaps be asserted that the special conflicting considerations in a case of personal injury balance out in such a way that there is no reason to make a distinction between personal injury and other types of damage (damage to goods or economic loss). However, the problem rarely arises in cases other than those of personal injury. It is no coincidence that the discussion on limitations upon the binding effect of judgments always concentrates on personal injury cases. Where damage to goods is involved, the problem is normally limited to the issue of timing prices to be applied in computing compensation where goods are rebought or repaired. Substantive law has generally regulated this issue by excluding any adjustment of these prices, cf. among others sec. 37 of the Insurance Act.[14] Although the need for a renewed assessment is somehow

[12] Cf. B. Gomard, *Civilprocessen*, 2nd ed. Copenhagen 1984, p. 467, Spleth, *op.cit.*, p. 144.

[13] Cf. Gomard, *op.cit.*, p. 492.

[14] Cf. regarding expropriation, Friis Jensen, *op.cit.*, pp. 243 ff., and, as far as judicial practice is concerned, 1973 UfR 14 (Supreme Court). The problem of inflation arises also in cases of personal injury; but where compensation is paid as an annuity maintaining its real value it is subject to special regulation and consequently falls outside the general rules regarding renewed assessment, cf. ch. 5, sec. 5, subsec. 2 of the Swedish Tort Liability Act 1972, cf. likewise Saxén, *op.cit.*, p. 299. The problem of maintaining the real value of a compensation was the main reason why Norwegian and Danish law chose to maintain compensation in the form of a lump sum, cf. *Instilling fra Erstatningslovkomitéen*, p. 41,

© Stockholm Institute for Scandianvian Law 1957-2009

less, this is not in itself an argument for refusing a renewed assessment, should the need arise in exceptional circumstances.

> As examples from Danish judicial practice may be mentioned 1975 UfR 257 (High Court for the Western District) regarding defects in bricklaying. In the first case the injured party had claimed and received compensation covering the expenses of having the façade painted, it being assumed on the basis of a statement from an expert witness that the defect in the bricks was merely that they became discoloured. Later the brickwork crumbled, so that the entire wall had to be torn down. A new claim on account of this was not dismissed since it could not be assumed that the defect had appeared at an earlier stage so that it could and should have been invoked during the first court case. Another example is found in 1949 UfR 804 (Supreme Court) regarding damage to a piece of real estate where the building had settled further subsequent to the first decision. During the first case no claim had been made and no position had been taken on the issue of compensation for future damage, and the injured party could not be blamed for not having made such a claim during the first case since it would not have been possible, or at least would have been difficult, to assess the problem at that time.

As previously mentioned, there may be a special need for a renewed assessment in situations where the damage consists of continuous nuisance in neighbourly relations or otherwise from an enterprise polluting the environment or in corresponding nuisance from a plant situated on expropriated land. As in the case of personal injury, it may be uncertain whether, or to what extent, damage or nuisance may occur in the future. Where compensation has been fixed as a lump sum on the basis of an actual assessment of the decrease in value which the nuisance inflicts upon the real property—or in the case of expropriation the remaining real property—the need for renewed assessment is the same should the nuisance turn out to be of much greater extent than assumed—seen in relation to the margin of uncertainty regarding the future which is involved in fixing compensation.

There is, however, at least one major difference from personal injury which has been particularly underlined in the Norwegian report on compensation for pollution damage.[15] While the balancing in cases of personal injury is first between the "consideration of restoration" and considerations of a more "jurisprudential" nature, *preventive* points of

and *Bet.* 976/1983, p. 59. In both countries the factors of capitalization constitute "fixed" variables in computing compensation in the meaning used above, so that subsequent changes in the rate of inflation, and consequently in the level of interest, cannot justify any renewed assessment.

[15] Cf. *NOU* 1982:19, p. 153.

© Stockholm Institute for Scandianvian Law 1957-2009

view may favour a wider possibility of renewed assessment in a case of permanent pollution damage. The difference lies in the fact that in these cases the tortfeasor is able to influence the extent of the damage caused, and that technological development may present a possibility of reducing pollution which was not envisaged at the time when compensation was fixed. Part of the background to the tendency to impose a strict liability upon a polluting enterprise lies in the fact that this is the only way to create a sufficient financial incentive for the enterprise to introduce the optimal reduction of pollution (the "polluter pays" principle). If compensation has been fixed as final, the enterprise actually has no incentive to use resources later to adopt new methods of counteracting pollution. Unless the injured party in the meantime, having cashed the compensation, has moved away, he therefore, in theory, also has an interest in renewed assessment, even if it should result in a *reduction* of the compensation. Even if the injured party should have sold his property at a reduced value, so that the buyer in that way has actually been compensated, there still remains the societal interest, which is not necessarily safeguarded sufficiently, or in the best possible way, through (new) explicit public injunctions.

If, however, compensation has been fixed as a lump sum, any later reduction runs into the same difficulty as where future personal injury has been compensated in the same way. To deal with this difficulty, authority to fix, and a practice of fixing, compensation for future nuisance as a current performance are therefore needed. For instance, sec. 9 of the Swedish Environment Damage Act contains this possibility,[16] and it has been proposed that a corresponding rule of the Norwegian Neighbour Act should be transcribed into a general statutory regulation regarding compensation for pollution damage.[17] Danish law appears to have limited itself to noting the lack of harmony between the "polluter pays" principle and the current basis for liability (negligence with some special exceptions of strict liability for certain types of damage).[18] The relevance of the way in which compensation is made for the implementation of this principle has received even less attention. Otherwise, as in cases of personal injury, the choice between a lump sum and a current performance will not be discussed here. Suffice it to note the

[16] *SFS* 1986:225. The rule has been transcribed from the Environment Protection Act, cf. *SOU* 1983:7, p. 280, and *Prop.* 1985/86:86, pp. 33 ff. and 58.

[17] Cf. *NOU* 1982:19, pp. 148 ff., 154 ff. and 274 ff.

[18] Cf. Jens Christensen in *Juristen* 1977, pp. 455 and 461 ff., and B. Gomard in *UfR* 1978 B, pp. 66 ff.

© Stockholm Institute for Scandianvian Law 1957-2009

special significance of this issue in relation to the possibility of obtaining a renewed assessment.

The discussion of whether a renewed assessment necessitates special legislative authority includes the problem of whether one may draw conclusions either by way of analogy or conversely from special statutory provisions on for instance the possibility of having maintenance adjusted.[19] As mentioned, it may be necessary to provide special authority if one maintains that the binding force of judgments is limited only by procedural rules on resumption of cases. The need for special legislative regulation is less if one adopts a less dogmatic approach, so that the doctrine of binding force does not exclude trying claims for compensation of effects of damage which the judgment could not take into account. The very fact that most cases of compensation are settled out of court makes it inappropriate and insufficient to view the problem primarily as a procedural one.

3. LEGAL POSSIBILITIES OF TAKING INTO ACCOUNT THE UNCERTAINTY REGARDING FUTURE EFFECTS OF DAMAGE

Only rarely do future effects of damage occur entirely unforeseen. One is often aware, when compensation is fixed, of a certain possibility that the damage may also have future effects, or that such effects may become either greater or smaller than could reasonably be envisaged at the time. The need for subsequent adjustment is less, the greater the possibility of taking the uncertainty into account when fixing compensation. This uncertainty may be taken into account *either* by taking *no position at all* on the issue of compensating future damage but only on compensation for damage which has already occurred (splitting up); *or* by *taking no final position* on future compensation but only making a preliminary decision; *or* by making a final decision which incorporates a certain compensation for the *risk* of (additional) future damage. The

[19] Cf. Saxén, *op.cit.*, p. 299. As mentioned, there is no doubt that one cannot simply apply an analogy of the rules of family law, cf. on this point T. Eckhoff, *Rettskraft*, Oslo 1945, p. 129, and cf. also *Prop.* 1975:12, p. 118, although there are admittedly obvious parallels between the problems, in particular the relevance to compensation for the loss of supporter of a new marriage being entered into or an actual cohabitation being established. However, here again the possibility of taking such new situations into account to a considerable extent depends upon whether compensation has been granted as a current performance, cf. von Eyben, *Kompensation for personskade*, pp. 734 and 822 ff.

© Stockholm Institute for Scandianvian Law 1957-2009

availability of these methods is generally recognized,[20] but a few comments will be made on the inherent problems.

1) *Splitting up*. Normally the injured party is not obliged to postpone his claim for compensation until the entire claim can be settled. The injured party may—substantively as well as procedurally—split up his claim and in the first instance seek compensation only for losses which may be settled at that time (e.g. loss of earnings, medical expenses). If splitting up the claim has been justified, so that the court has had no opportunity to decide the issue of compensation for future damage, the decision naturally does not exclude a later claim.[21] In these situations the problem of the binding force of decisions does not arise. The question may, however, arise whether the injured party should explicitly state that his claim includes only part of the total or possible compensation, i.e. whether splitting-up should be manifest from a special *reservation*. In some cases it would be natural to require an explicit reservation, particularly if the question of compensation for future effects has been brought up during the case and the other party has insisted that the case be finally settled.[22] But if it is obvious that future damage will occur although its extent cannot immediately be decided, or if later damage occurs so unexpectedly that the possibility was not even envisaged during the case, the possibility of making a new claim should not be contingent upon an explicit reservation.[23] In principle there is no difference between this latter situation and one where a certain compensation for future damage has been given by the first decision but where the extent of the damage unexpectedly changes.

2) *Preliminary Decision on Compensation for Future Damage*. Should it be evident at the time of decision that additional damage will subsequently occur, but the extent and duration of such damage presents considerable uncertainty, an obvious solution would be to postpone final settlement of compensation for future damage but at the same time to award preliminary compensation for the period until final settlement.

If one wishes to make sure that the compensation involved in a

[20] Cf. e.g. *Instilling fra Erstatningslovkomitéen*, p. 42 (referring particularly to preliminary decisions), *SOU* 1973:51, p. 165, *Prop.* 1975:12, p. 171, *LU* 1975:16, p. 29, and—outside the area of personal injury—*NOU* 1982:19, pp. 148 ff. (on the Neighbour Act, sec. 16) and pp. 154 ff.

[21] Cf. e.g. Gomard, *op.cit.*, pp. 493 ff., and Eckhoff, *op.cit.*, p. 126.

[22] Cf. e.g. from Norwegian judicial practice, 1976 Rt. 289, and from Danish judicial practice, 1960 UfR 605 (Supreme Court).

[23] Cf. Gomard, *op.cit.*, pp. 497 ff., and A. Vinding Kruse, *Erstatningsretten*, 4th ed. Copenhagen 1986, pp. 526 and 625.

© Stockholm Institute for Scandianvian Law 1957-2009

decision of this type includes only the preliminary period in question, the compensation must take the form of a current performance. The possibility of making preliminary decisions regarding the extent of future damage consequently depends upon whether legislation authorizes compensation in the form of interest, possibly in particular instances, cf. secs. 3–9 of the Norwegian Damages Liability Act. Particularly if the crux of the uncertainty lies in whether future damage will become permanent, the preliminary award of a lump sum does not appear appropriate. The mere fact that the decision is framed as preliminary leaves entirely open the final settlement of compensation, so that the amount may be increased, decreased or revoked without major changes being required. In case of a lump-sum payment, a reduction or revocation would consequently result in part of the compensation having to be paid back. The situation is different if at least a certain minimum of permanent future damage may be envisaged. If so, it is possible to award preliminary damages in the form of a lump sum, and when it comes to adjustment, compensation may be given for any possible additional permanent damage. This involves splitting up the compensation for future damage.

The Danish law of tort provides no possibility of granting preliminary compensation in the form of a current performance. The system is well known from workers' compensation insurance,[24] but when the Damages Liability Act was adopted the possibility of transcribing the system to the law of torts was clearly rejected.[25] Instead, emphasis was put on reaching a final settlement of compensation for permanent injury at as early a stage as possible, particularly so that the parties may claim that compensation for the loss of working capacity be fixed as soon as the health situation of the injured party has become medically stable. Continuing this line of thought, the commentaries to the Act made it clear that there is little possibility of taking into account the outcome of attempts at rehabilitation—obviously the chief element of uncertainty as to the future earning capacity of an injured party. The special uncertainty regarding future loss of working capacity relating to injured children, which is normally pointed out as a main reason for postponing final settlement, has likewise been accommodated through rules according to which the medical degree of disability becomes decisive in fixing compensation, cf. sec. 8 of the Damages Liability Act. The advanced stand-

[24] Cf. A. Friis and O. Behn, *Arbejdskadeforsikringsloven med kommentar*, Copenhagen 1984, pp. 246 and 283 ff.

[25] Cf. *Bet.* 976/1983, p. 211, and *Folketings Tidende* 1983/84, part 2, app. A, col. 91.

© Stockholm Institute for Scandianvian Law 1957-2009

ardized fixing of compensation also underlies the special limitations upon the possibility of a renewed review, cf. below section 4.1.3.

It even appears doubtful whether Danish rules allow a splitting-up of the compensation for future damage in the sense discussed above (except where permanent injury may be "split up"). As mentioned, both parties may claim that compensation for permanent disablement be fixed when the state of health is stable, and the finality of the decision is limited only by the special rules on resumption.[26]

Combined with the provisions on resumption, the difference between Danish and Norwegian law may be expressed as follows. Under Norwegian law, the uncertainty regarding future developments may be taken into account through a preliminary decision; but where a final decision is reached instead there is no possibility of adjustment, regardless of what may happen later. Under Danish law, only final decisions are admitted, but if conditions subsequently change (considerably) the decision may be resumed. In other words, the Norwegian solution presents better possibilities of taking present uncertainty into account, whereas the Danish solution presents better possibilities of allowing for later changes. If these possibilities are offered as alternatives—which is not necessary, cf. Swedish law—it is a moot point which solution is more suitable for taking into account considerations of rehabilitation, "adjustment to the situation", and the wish to counteract compensation neuroses. As mentioned, the difference lies primarily in the fact that, by definition, preliminary decisions must entail more far-reaching possibilities of adjustment than final decisions. Preliminary decisions create uncertainty for the injured party. It may be unfortunate that the injured party knows for instance that the more successful the rehabilitation, the greater the reduction of compensation when it is finally settled. But making final decisions in an uncertain situation may result in compensation which is quite inappropriate to the loss actually incurred: it may, for instance, be inappropriate to grant compensation for a loss of working capacity which turns out not to occur, because of entirely successful rehabilitation.

3) "*Compensation for Risk*". Another intermediate solution would be to grant the injured party a certain compensation as a kind of danger-money where there is a known risk of additional damage, but where its likelihood is too small to take into account when fixing compensation. Also, in this situation the problem is greater in a case of personal injury

[26] Cf. von Eyben, *Erstatningsudmåling*, p. 227, A. Vinding Kruse and Jens Møller, *Erstatningsansvarsloven med kommentarer*, Copenhagen 1985, p. 187.

© Stockholm Institute for Scandianvian Law 1957-2009

than in, for instance, the risk of additional damage to real estate, because the mere existence of the risk may decrease the value of the property and consequently form a basis for computing the actual loss.[27] In cases of personal injury, experience frequently shows that there is a certain risk of complications arising later on, or that the injury will otherwise result in later effects. If so, the problem becomes whether the injured party should be granted compensation for this risk immediately, or whether he should be able to make additional claims if the complications or the effects later materialize.

The tendency appears to be that one tries to take predictable risks into account in computing the compensation,[28] and much may be said in favour of this solution, at least in relation to the fixing of compensation for permanent non-economic loss where the risk is fairly significant (one might call this "inconvenience money").[29] This solution is more problematic in the case of a slighter risk but one with greater consequences for the injured party's working capacity. A correct computation of compensation will have to take into account the magnitude of the likely damage, discounting the likelihood of its occurrence, and this may in itself be difficult or impossible. Further, the result would be that most injured parties would receive compensation without subsequent loss,[30] whereas such compensation would be insufficient to cover the loss of the few who actually suffer it. This is so unless the compensation may be used, and actually is used, for insuring the injured party against the risk.[31] However, in most cases the risk cannot be calculated with sufficient certainty to make this solution possible. It may be that the injured party prefers to use the damages for an entirely different purpose. If so, renewed review is a better solution; if this is impossible because limitations upon the possibility of review, one is forced to operate, on a dubious basis, with a margin for uncertainty greater than what is necessarily involved in assessing the future development.[32]

[27] Cf. K. Selmer in *Festskrift til Kristen Andersen*, Oslo 1977, pp. 329 ff.

[28] Cf. from Danish jurisprudence, 1961 UfR 1041 (Supreme Court) and from Norwegian, 1951 Rt. 513.

[29] Cf. H. Kallehauge in *UfR* 1986 B, p. 389.

[30] Cf. Nordenson *et al.*, *op.cit.* in footnote 1, p. 204.

[31] Cf. in particular regarding "the risk of catastrophe" in connection with eye damage and the like, K. Selmer in *Festskrift til Kristen Andersen*, pp. 326 ff. and 334 ff., and von Eyben, *Kompensation for personskade*, pp. 671 and 678 ff.

[32] Cf. e.g. on the relevance of the limited possibility of renewed review under sec. 11 of the Damages Liability Act, B. Gomard and D. Wad, *Erstatning og godtgørelse efter erstatningsansvarsloven og voldsofferloven*, Copenhagen 1986, p. 52.

© Stockholm Institute for Scandianvian Law 1957-2009

4. PERSONAL INJURY

4.1. *The Law of Torts*

4.1.1. *Legislation*

Only Sweden and Denmark have, to some extent, adopted statutory provisions on the right of renewed review.

The relevant provision of the Swedish 1972 Tort Liability Act runs as follows:

> Compensation for a loss of income or a loss of support which is given in form of an annuity may be increased or reduced should the conditions dealt with in this chapter which have formed the basis for fixing the compensation be substantially changed. Where the compensation has been fixed in the form of a lump sum the injured party may under identical conditions be granted a supplementary compensation.

Section 11, para. 1, of the Danish Damages Liability Act runs as follows:

> A case regarding compensation for permanent injury or for permanent loss of capacity to work which has been closed, may be resumed at the request of the injured person, should unforeseen changes occur in the injured person's general health condition, so that the injured person's degree of disablement or degree of loss or impairment of capacity to work must be assumed to be considerably higher than originally assumed.

Thus both provisions confirm the principle that major unforeseeable[33] changes may justify a renewed review, and that compensation in the form of a lump sum can only be increased.[34] Apart from the apparently entirely unexplained limitation of the Swedish provision for compensation for economic loss, the difference between the rules lies in the requirements regarding the nature of changes, cf. below. The rules might be understood to the effect that renewed review is contingent upon the injured party having been granted a certain compensation for permanent injury by the first decision; but—at least as far as Danish law is concerned—this is not so. Regardless of whether the question was reviewed with the result that, on the basis of what was known, the injured party was not entitled to compensation for permanent injury, or whether the question was not raised in the first place because there was no reason to envisage the possibility of future damage, a claim may be

[33] Cf. Nordenson *et al.*, *op.cit.*, p. 203; cf. from jurisprudence before the Tort Liability Act, 1965 NJA 235.

[34] According to the proposal in *SOU* 1973:51, pp. 162 and 312, only annuities should be subject to renewed review.

© Stockholm Institute for Scandianvian Law 1957-2009

made where circumstances change.[35] Here the condition that a change must be a major one may not be very meaningful, but presumably it is at any rate fulfilled where unexpected permanent effects occur.

Finnish and Norwegian law have no statutory provisions regarding the issue, but most legal writers agree that the legal position is unclear.[36] This stems from the adoption of what one might call:

4.1.2. *"The Procedural Point of View"*

The procedural point of view was distinctly expressed in the decision reported in 1934 Rt 1134, which dismissed a case regarding a claim for compensation of future loss of working capacity on the ground that the issue of compensation for future damage had been adjudicated in an earlier case (without the injured party having been granted any compensation since it was not found predominantly likely that future damage would occur). The case had therefore been closed, so that the only possibility open to the injured party was to seek resumption under the rules of procedural law. Even less can a new claim be made if the change is only that future damage has become more extensive than envisaged by a previous award of compensation.[37]

It is understandable that Norwegian law has had difficulties in accepting this decision. Various attempts have been made to limit its scope particularly so that it should be possible to make new claims where the effects of damage prove to be entirely different from what was initially envisaged.[38] However, an attempt to classify various types of effect on the basis of their substance would almost inevitably lead to arbitrary results (how for instance to classify an unexpected weakening of the intellect after a cerebral injury?), just as it does not appear particularly rational to treat changes of a substantive nature differently from quantitative changes (e.g. a greater degree of weakening of the intellect than originally envisaged). Finally, the injured party is forced to make some difficult decisions regarding the framing of his claim in the first case, if he is finally bound by a claim for compensation for future damage

[35] Cf. von Eyben, *Erstatningsudmåling*, p. 234, Vinding Kruse and Møller, *op.cit.*, p. 179, and Gomard and Wad, *op.cit.*, p. 81.

[36] Cf. P. Lødrup, *Erstatningsberegningen ved personskader*, 2nd ed. Oslo 1983, p. 49, and Saxén, *op.cit.*, p. 299.

[37] Cf. A. Bratholm and J. Hov, *Sivil rettergang*, Oslo 1973, p. 427, and N. Nygaard, *Skade og ansvar*, 3rd ed. Bergen 1985, p. 91.

[38] E.g. psychic versus physical effects, cf. Eckhoff, *op.cit.*, pp. 129 ff.; cf. also Nygaard, *op.cit.*, and E. Eriksrud in *NFJFP* no. 37, p. 40.

© Stockholm Institute for Scandianvian Law 1957-2009

instead of being unbound.[39] A decision on a possible splitting-up of the claim should not depend upon speculation as to whether the defendant's possible exoneration from a claim for compensation for future damage could result in later dismissal despite intervening changes. According to the commentaries to the Act, preliminary decisions may be applied only in exceptional circumstances where the facts are particularly uncertain.

In Norwegian law any attempt to limit the scope of the procedural approach runs into the impediment that, as previously mentioned, the committee drafting the Damages Liability Act actually accepted the procedural approach. Statements advocating a wider possibility of renewed review[40] can therefore only be taken at face value as an expression of legal policy. And that is actually what they amount to.

4.1.3. *What Changes may Justify Renewed Review?*

The basic difference between the provisions of the Swedish Tort Liability Act and the Danish Damages Liability Act is that the Swedish rule permits a renewed review wherever there is a (major) change in the conditions upon which compensation was based, whereas the Danish rule requires (major) changes in the health of the injured party. In other words, Danish law limits the possibility of a renewed review to changes in the extent of the *physical* (or mental) damage, whereas under Swedish law changes in the *financial effects* of unchanged physical damage may justify a renewed review. In practice this difference means that under Swedish law an injured party may be granted additional compensation for the loss of working capacity, if it should later prove that, contrary to expectations, the injured party cannot retain a job, e.g. because a sympathetic employer who exempted the injured party from strenuous work, is later obliged to close his business, and the injured party cannot obtain work elsewhere.[41] More general factors may also, depending upon circumstances, justify a renewed review, particularly changes in the labour market.[42] The commentaries to the Danish rule make it perfectly clear that the intention was to exclude a renewed review on such a basis, so as "to avoid a major number of cases regarding re-

[39] Cf. on Finnish law, Saxén, *op.cit.*, p. 299.
[40] Cf. Lødrup, *op.cit.*, p. 40.
[41] Cf. *SOU* 1973:51, pp. 163 and 314.
[42] Cf. *LU* 1975:16, p. 28.

© Stockholm Institute for Scandianvian Law 1957-2009

view".[43] Unfortunately, there has apparently been no Danish attempt to examine whether Swedish experience supports this fear. A Swedish evaluation of this point of view would therefore be of major interest.

Obviously it is easier to assess the causal relation between the damaging act and a deterioration of health than the relation between the act and other changes in the injured party's work situation.[44] In practice therefore it will normally be more difficult to obtain additional compensation on purely economic grounds, so that the Danish fear of a great number of cases to review may be exaggerated. But the limitation may be a consistent prolongation of the principle guiding the fixing of compensation for the loss of working capacity (decision when the state of health is stable; limited possibility of including rehabilitation in the prognosis of the injured party's employment situation). The question remains, however, whether the total effect of these rules would amount to a major compromising of the financial disablement assessment (as opposed to a medical approach) which, in principle, was introduced by the Damages Liability Act.[45] The courts could be disinclined to refuse the granting of compensation for a loss of working capacity in a case of serious medical disablement, even if the injured party at the time of decision has a normal income, and even if there is no specific reason to assume that he will not be able to continue work.[46] Limitations upon the right to a renewed review could therefore conceivably influence the way in which the rules on fixing compensation are applied, so that one adopts a more abstract assessment of future damage than indicated by these rules.

> The rule in sec. 11 of the Damages Liability Act further raises some doubt regarding the extent of a renewed review where the conditions for resumption are fulfilled. The phrase ("so that") can hardly be understood in any other way than to mean that the requirement regarding changes in health not only constitutes the "procedural" condition for resumption but also involves a "substantive" limitation upon the possibility of review.[47] Thus one can take into account only such changes in the loss of working capacity as stem from a deterioration of general health but no other changes in the injured party's economic situation, even if they would have been included

[43] *Folketings Tidende* 1983/84, part 2, app. A, col. 98.

[44] Cf. Nordenson *et al.*, *op.cit.*, p. 204, and von Eyben, *Kompensation for personskade*, p. 686.

[45] Cf. Bo von Eyben, "Standardized or Individual Assessment of Damages", 29 *Sc.St.L.*, pp. 58 ff. (1985).

[46] Cf. von Eyben, *Erstatningsudmåling*, pp. 141 and 144, and footnote 32 above.

[47] Cf. von Eyben, *op.cit.*, p. 235, and Gomard & Wad, *op.cit.*, p. 80; for a different opinion, cf. Vinding Kruse and Møller, *op.cit.*, p. 183.

© Stockholm Institute for Scandianvian Law 1957-2009

in the assessment of loss had they existed when the first decision was made. It will undoubtedly become difficult to uphold this distinction, particularly in situations where the injured party has been obliged entirely to give up any gainful occupation (cf. the example above), but where there is only a minor deterioration of general health, the independent relevance of which to the change in the economic situation appears doubtful.

4.1.4. *The Significance of Agreements: Reservations and Waivers*

In most cases the question of compensation is decided through a settlement between the injured party and the tortfeasor's liability insurance company, possibly after the issue of the basis of liability etc. has been decided by a judgment, so that the practical problem is whether the possibility of a renewed review depends upon what was agreed when the settlement was reached. This problem has two aspects: whether the possibility of a renewed review is contingent upon the injured party having made a *reservation* to this effect, and whether the possibility of renewed review which the rules of law might open to the injured party can be eliminated through an agreement, i.e. whether the injured party may validly *renounce* his right to a renewed review.

It is not surprising that the possibility of a renewed review where compensation has been fixed through a settlement is contingent upon a reservation having been made, in countries in which it is otherwise associated with the procedural rules on resumption.

Turning to Norwegian law, reference is made to 1972 RG 36 where the injured party had received a certain compensation for his loss up to the date of the settlement, and where he had made no reservation regarding compensation for a future loss of working capacity since, having been reported fit for duty, he did not envisage such a loss. Since the injured party had made no reservation and since there was no basis for interpreting the settlement to the effect that subsequent unforeseen effects had not been taken into account in fixing compensation, the injured party himself had to carry the risk of any such effects. The judgment added that if one were to apply the principles regarding non-fulfilment of implied conditions, it would be necessary to demonstrate very special reasons why the injured party should not be bound by the settlement, and there were no such special reasons in the present case.

A different decision is reported in 1980 Rt 84. Here the issue of compensation for future loss of working capacity had been raised during negotiations on a settlement against the background of medical statements to the effect that it was difficult to assess the extent of future disablement, particularly due to a possibility of post-traumatic epilepsy. As part of the settlement, the injured party received a compensation for loss occurring up to that time, but "for the record" a reservation was made regarding future economic loss should effects such as the one mentioned by the doctors

© Stockholm Institute for Scandianvian Law 1957-2009

occur. Several years later the damage did have serious subsequent effects, but not epilepsy. The correspondence between the lawyer and the insurance company regarding the medical statements was scrutinized and interpreted by the court, which concluded that the reservation should not be interpreted as referring exclusively to the risk of epilepsy, and the claim for additional compensation was consequently upheld.

These judgments do not appear satisfactory. It is not reasonable to require a reservation in relation to an unforeseeable deterioration. It simply means that an injured party is always forced to make a reservation to be on the safe side. Admittedly, the injured party's lawyer may enter a reservation as a matter of routine, but not all injured parties have the assistance of a lawyer, and not all lawyers have the same routine; and even those who do, may err. If one is aware of the possibility of a deterioration in a particular respect and makes a reservation accordingly, one runs the further risk that this may in itself exclude a review where there is deterioration of a different nature. It may occasionally appear reasonable to take into account whether a reservation is made regarding a *known* risk which has been part of settling the compensation (cf. section 3 above on splitting up); but it ought not to have any bearing on the assessment of a risk which was *unknown* at the time of settlement. The principles regarding changes in implied conditions are either insufficient or superfluous for the purpose of securing a reasonable limitation upon the binding effect of a settlement. Only the requirement of the theory of implied conditions regarding relevance is, to some extent, meaningful; but not as a subjective instrument to decide what the parties—or "reasonable" parties—would presumably have agreed upon, had they been aware of the possibility of a deterioration. One might say that as a matter of law the injured party shall not carry the "risk" of unforeseeable major changes in the conditions upon which a settlement was reached.

There is no reason to hesitate in recognizing agreements on an extended possibility of renewed review. An extensive reservation made by the injured party will thus take effect, but naturally only upon condition that it is accepted by the other party.

The real problem is the opposite one, i.e. whether the injured party may validly waive a right of renewed review which he would otherwise have had. There is no direct legislative prohibition against such agreements. The Swedish Act may, on the whole, be set aside by agreement between the parties. According to sec. 27, subsec. 1, of the Danish Damages Liability Act agreements which deviate, among others, from sec. 11 of the Act in the injured party's disfavour are invalid only if they are entered into before the damage occurred.

© Stockholm Institute for Scandianvian Law 1957-2009

It cannot be denied that in certain instances it would be unreasonable if a settlement should be less final than contemplated. But if so, the decisive element should be an assessment of the substance of the settlement and not any indication in the settlement itself concerning its finality. If, for instance, the settlement includes "danger-money", cf. section 3 above, the settlement cannot be touched if the risk materializes at a later stage. It is also conceivable that an overall settlement of various disputable points which have been negotiated has been reached, and that the injured party through the settlement has received a certain indirect "compensation" for the risk of future development, for instance by the other party having given up other fairly tenable objections to the claim for compensation. It is, however, doubtful what weight this point can carry in general cases regarding personal injury, and involving a balancing of factors which are highly incommensurable (e.g., the injured party carries the risk of future damage in return for the insurance company giving up its objection of contributory negligence). Phrases in a settlement to the effect that the case has been "irrevocably concluded", or similar wordings, should not be decisive—for Danish judicial practice, cf. 1948 UfR 521 (High Court for the Eastern District) and below regarding personal insurance.

The decisive view must be the following. The fact that legislation —particularly consumer legislation—increasingly invalidates agreements concluded when the, presumably, weaker party may have difficulties in grasping its consequences clearly favours not accepting an injured party waiving his right to renewed review. This view naturally forms the background of the rule in sec. 27, subsec. 1, of the Damages Liability Act. But in relation to renewed review it is superfluous, as well as insufficient, to associate invalidity with agreements entered into before the *damage* occurred. The decisive element should be the time at which *deterioration* occurs.[48]

4.2. *Personal Insurance*

4.2.1. *Legislation*

The interest of insurance companies in acquiring, as soon as possible, general knowledge of final claims is particularly great in the case of personal insurance, including, above all, accident insurance.[49] The main

[48] Cf. von Eyben, *op.cit.*, p. 29, and Gomard & Wad, *op.cit.*, p. 161, but differently Vinding Kruse & Møller, *op.cit.*, pp. 188 and 346, who are in favour of letting invalidity depend upon an application of sec. 36 of the Contracts Act.

[49] Cf. *NOU* 1983:56, p. 160.

© Stockholm Institute for Scandianvian Law 1957-2009

position of legislation is, however, an unlimited application of the principle of causality, cf. sec. 120 of the Insurance Act, according to which the insurer, in cases of accident occurring during the insurance period, is liable for damaging effects which do not occur until later. The rule is, however, not mandatory and it is a well-established condition of accident insurance to fix certain time limits, so that disablement (or death) must have occurred within a certain fairly short period, normally no later than one to three years after the accident.[50] The problem is whether this constitutes an absolute time element and what the relation is between this limit and the current statute of limitation, cf. sec. 29 of the Insurance Act and sec. 39 of the Swedish Consumer Insurance Act.[51] Needless to say these problems arise not only in cases of deterioration subsequent to a settlement of compensation, but also in situations where the injured party does not become aware until later of the possibility of making a claim against the insurance company. But frequently the case will be *that* the insurance company has been notified of an accident, *that* claims for compensation have been made on account of the accident, and *that* compensation has been paid to the injured party to meet such claims; whereupon the injured party later—possibly much later—makes additional claims for compensation for disablement, regardless of whether the settlement included any compensation for disablement, or whether the injured party now considers the degree of disablement to be higher. This problem has not received the same attention as the parallel in the law of torts, and there appear to be few decisions in judicial practice.

> As an example may be mentioned a Danish decision by the Insurance Board of Appeal (AKN 6792/81) regarding an accident which occurred in September 1971, and of which the company was notified in December 1975. In June 1976 the degree of disablement was estimated at 50 % and the company paid compensation accordingly. In 1979, after the case had been resubmitted to the Workers' Compensation Board, the degree of disablement was estimated at 75 %, and consequently the injured party made a claim in October 1979 for compensation for the additional 25 % disablement. The company rejected the claim, arguing that it was barred by limitation. The company invoked the traditional policy terms ("compensation for disablement shall be fixed as soon as it is possible to define the final

[50] Cf. P. Lyngsø, *Forsikringsaftaleloven med kommentarer*, 2nd ed. Copenhagen 1983, p. 513, J. Hellner, *Försäkringsrätt*, 2nd ed. Stockholm 1965, p. 497, K. Selmer, *Forsikringsrett*, 2nd ed. Oslo 1982, p. 270, and *NOU* 1983:56, p. 158.

[51] Cf. on this point *SOU* 1977:84, pp. 250 ff. As for the Norwegian personal insurance bill, cf. *NOU* 1983:56, p. 164.

© Stockholm Institute for Scandianvian Law 1957-2009

> effects of the accident, but no later than 3 years after the accident"), and as a consequence thereof alleged that the claim was due no later than three years after the accident, i.e. in September 1974, whereafter the 5-year limitation provided by sec. 29 of the Insurance Act expired in September 1979. The insurance company's claim was not upheld. The Insurance Board of Appeal referred to the fact that under sec. 120 of the Insurance Act the main rule was that the company should cover all effects of the accident, including effects which did not appear until after compensation had been fixed, and that the terms of the policy did not "with sufficient clarity" limit the legal position of the insured party in relation thereto or in relation to the statutes on limitation, including sec. 29 of the Insurance Act.

In other words, the insurance company did not take the position that the terms of the policy themselves stipulated a particular limitation, but that they stipulated the latest time at which the absolute term of limitation of 5 years under sec. 29 of the (Danish) Insurance Act began to run. This rule has no provision for suspension.[52] The only decisive element becomes at what juncture the claim appears to be due. In this way there may be a major difference from claims under the law of tort, under which the general 5-year limitation may be suspended for as much as 15 years so long as the injured party, on account of excusable ignorance of his right to claim, has been unable to exercise it, cf. e.g. 1961 UfR 620 (High Court for the Western District). The wording of sec. 29 of the Insurance Act is unclear as to how far one may construe some kind of suspension rule in the provision that the claim shall be due, since the provision also contains a two-year limitation *with* a suspension rule.

There is thus a need for clarification of the extent to which claims for additional compensation on account of unforeseeable later effects of an accident (an insurance event) are barred by rules on limitation, and of the significance of traditional policy terms in this respect. Naturally the question arises of harmonizing the rules with general rules on limitation. The problem is particularly acute in cases of liability insurance; but even in cases of personal insurance there ought to be only a fairly brief limitation with a suspension rule and a longer limitation calculated from the time at which the insurance event occurred.[53] To use the time at which the claim falls due as the criterion for the start of the period of

[52] Cf. Lyngsø, *op.cit.*, p. 224.

[53] For instance 3 years/10 years, cf. sec. 39 of the Swedish Insurance Act and the proposal in *NOU* 1983:56, p. 164, which, on the other hand, explicitly gives the companies a possibility of establishing specific provisions on the assessment of disablement and on the time at which the claim becomes due, as is also done now in insurance policies (sec. 9–5, para. 2, cf. p. 163).

© Stockholm Institute for Scandianvian Law 1957-2009

limitation cannot but create confusion. A claim may be due even though it cannot yet be settled finally, although this is not consonant with the rules fixing the time at which the company is obliged to pay, cf. sec. 24 of the Insurance Act. It follows that the period of limitation of the injured party's claim, including a claim for additional compensation in case of deterioration, should not run until the time at which the damage or the deterioration appeared clearly enough to afford the injured party sufficient basis for making his claim (e.g. when his state of health is stable). Given rules securing an early notification regarding the insurance event itself[54] and a reasonable absolute period of limitation running therefrom, it is hard to see the justification, or the legal significance, of policies specifying the time within which the degree of disablement shall be fixed.[55] It may conceivably have some educational value to provide that the degree of disablement shall be assessed within a certain time after the accident, and in general the insurance companies do not appear to attach any other importance to such policy provisions.[56]

4.2.2. *Renewed Review, particularly where a Compensation Claim has been Settled out of Court*

It is hard to see any reason why the injured party's right to renewed review in a case of a major unforeseen deterioration should be narrower where fixing of the compensation involves an accident insurance company than where it involves a tortfeasor and his liability insurance. Danish judicial practice, at any rate, does not appear to treat these situations differently.

> Cf. the implications of a Supreme Court judgment reported in 1938 UfR 24 concerning a case where the injured party had been granted compensation for temporary loss of income and compensation for 20% permanent disablement by an earlier judgment. Some years later he claimed additional disablement compensation, since he now considered that the degree of

[54] Cf. in this connection 1944 UfR 203 (High Court for the Eastern District) regarding damage which occurred during athletic sports but of which no notification was given until 9 years later, since it was not until then—after a big toe had been amputated—that the injured party realized that he had become disabled. In the concrete circumstances there appears to have been reason to give notification of the damage (although not of the claim) at an earlier stage, but it is doubtful whether this negligence was relevant to the liability of the company, cf. sec. 21, subsec. 2, of the Insurance Act.

[55] Cf. in this connection corresponding time-limits according to sec. 26 of the Danish Workers' Compensation Act, von Eyben, *Kompensation for personskade*, pp. 683 ff. These rules often necessitate making preliminary decisions but that possibility is normally not available under private accident insurance.

[56] Cf. Opinion no. 2160 of the Danish Insurance Association (1977 UfR 225).

© Stockholm Institute for Scandianvian Law 1957-2009

> disablement should be fixed at 66 2/3 per cent. The case was dismissed on the grounds that the basis of the claim was not essentially different from that during the earlier case, which had also taken into account the risk that the injured party might permanently lose his working capacity in his habitual occupation. Thus no major deterioration of health had occurred, at any rate not in relation to the margin of uncertainty adopted in the first decision. Had the case involved a major deterioration, and not just a different assessment of facts already known, it would not have been dismissed; cf. on this point also the dissenting opinion of the Supreme Court judgment.

The significance of settlements is even greater in cases of accident insurance than in tort cases. There are examples where insurance companies have tried to write far-reaching waivers into receipts, to exclude any right of renewed review; cf. e.g. the following wording in 1928 ASD 236 (High Court for the Eastern District):

> The undersigned has received DKK 4,000 in full and final settlement—including already established effects of the accident as well as its possible future effects—the receipt of which he/she hereby acknowledges, adding that he/she is hereafter excluded from claiming any additional compensation, even if the effects of the accident should later prove to be more comprehensive than envisaged at this stage.

This wording was accepted. The injured party could not make any additional claim against the company.

It would be unsatisfactory for the injured party's right of renewed review to depend upon his ability to resist a pressure of this nature. That he does have a legal right to resist became clearly manifest in a case in which the company demanded a receipt and release on the ground that—according to the policy limitations referred to above—a degree of disablement had been finally fixed.[57] The injured party, however, insisted upon making a reservation regarding subsequent deterioration in accordance with sec. 120 of the Insurance Act. On this point the Danish Insurance Association said

> ... that a company has no right to demand that the insured by signing a receipt and release, or in other way, waive the right which he would have under general rules of claiming additional compensation on the ground that the damage proves to have effects much more serious than those which could be envisaged at the time when the degree of disablement was assessed.

What was stated in section 4.1.4 above is equally valid in these situations. The right of renewed review should not be conditional upon

[57] ASD 1966 A 115.

© Stockholm Institute for Scandianvian Law 1957-2009

reservations, and it should not in general be possible to agree upon its exclusion. Naturally one may get part of the way through a restrictive interpretation,[58] cf. e.g. 1908 UfR 936 (Supreme Court), where it was held that a receipt to the effect that the company had "fulfilled all claims which the insurance contract entitled the insured to make as a consequence of the accident" did not prevent the injured party from claiming compensation for disablement, since the receipt had been issued at a time when the injured party, according to available medical statements, had apparently recuperated. But, as appears from the example above, one may run into wordings which exclude any possibility of a restrictive interpretation. Should such agreements be found inequitable *per se*, at any rate in a consumer relation, a mandatory rule would be preferable to general rules of unconscionability in contract law.

Circumstances obtaining or which could be envisaged at the time a settlement was entered into and concerning which information could have been procured, do not provide a basis for a subsequent contestation of the settlement,[59] cf. e.g. from Danish judicial practice 1925 UfR 508 (High Court for the Eastern District) and more recently—outside the field of personal insurance—1986 UfR 138 (Supreme Court) regarding the fixing of damages in a case of fire insurance. The insured claimed that the compensation agreed upon in a settlement turned out to be insufficient to cover the expenses of rebuilding the house. The claim was not upheld since compensation had been fixed on the basis of an assessment, and since the insured, who was assisted by an architect and an engineer, had had the same possibilities as the insurance company of assessing the cost of rebuilding the house. Where equal parties "trade" the uncertainty, it is natural that unreserved acceptance of a settlement regarding compensation entered into on that basis prevents the insured from contesting the settlement later on.

5. POLLUTION DAMAGE

5.1. *Liability*

The issue of renewed review in case of unforeseen effects of damage is, among other things, merely one particular aspect of the fundamental

[58] Cf. Hellner, *op.cit.*, p. 195, and Lyngsø, *Dansk forsikringsret*, 4th ed. Copenhagen 1981, p. 223.

[59] Unless of course one is faced with "original" invalidity under contractual law, cf. in this connection 1969 Rt. 572 regarding a company's misleading.

© Stockholm Institute for Scandianvian Law 1957-2009

problems regarding the temporal extension of liability involved in pollution damage and—associated therewith—the possibilities of safeguarding oneself through a liability insurance, or in some other way, against claims for compensation for damage preferred long after the damage occurred. The real problem is the duration of the "absolute" period of limitation and the possibility of securing insurance coverage, one way or another, covering the same period of time.[60] The rule on liability becomes ineffective if it imposes greater liability than what can be covered by insurance. As previously mentioned, it is particularly important in liability insurance to make sure that a claim against the insurance company cannot be impeded by a special brief period of limitation which cannot be suspended.[61] In business liability insurance, it is generally agreed to apply the principle of effects of damage, so that claims must be made within a certain period after the insurance has been discontinued. The evaluation of special liability insurance for pollution damage as an extension of traditional business liability insurance is still a novel phenomenon.[62]

The problem is not just that pollution later proves to be much more extensive than envisaged when compensation was fixed. The more frequent situation is that the damage remains undiscovered until long after the polluting activity occurred. In most cases, the issue of renewed review consequently arises where account has been taken of certain nuisance following from the pollution when compensation was fixed, but where it turns out later on that the nuisance was much more extensive or more permanent than previously assumed.

In cases of pollution damage, the possibilities reviewed in section 3 above of counteracting the uncertainty regarding the extent of future damage will often acquire a meaning somewhat different from the meaning in cases of personal injury. Admittedly, the principle is the same: if the entire claim for compensation could have been settled during the first case, a splitting-up of the claim will not be permitted, so

[60] Cf. on this point the discussion whether the general current statutes of limitation are satisfactory in cases of pollution damage in *NOU* 1982:19, pp. 213 ff., and in *SOU* 1983:7, pp. 194 ff., the proposal of which concerning a particularly extensive period of limitation (25 years) in certain cases of personal injury was not adopted in the Environment Damage Act, since it was held that the problem had to be solved in connection with a possible creation of a system of funds to cover late effects, cf. *Prop.* 1985/86:223. pp. 30 ff.

[61] Under current (Danish) law the problem can only be avoided where the injured party has a direct claim against the liability insurance company, cf. e.g. 1972 UfR 730 (Supreme Court) and Vinding Kruse & Møller, *Erstatningsansvarsloven med kommentarer*, p. 185.

[62] Cf. regarding Sweden, E. Strömbäck in *NFT* 1986, pp. 172 ff., and regarding Finland, J. Savonen in *NFT* 1979, pp. 277 ff.

© Stockholm Institute for Scandianvian Law 1957-2009

a subsequent attempt at processing the remaining part of the claim will be dismissed. Where it is known that a polluting enterprise will cause nuisance to real estate, immediately as well as in the future, it will often be possible to compute a claim for compensation for the current reduction in the value of the estate, despite possible uncertainty regarding the extent or duration of the nuisance or the possibility that (additional) damage to the estate might occur later. Or, to put it briefly: the possibility of claiming "danger-money" will exclude the possibility of splitting up a claim in these situations more often than in cases of personal injury. The theme of a case claiming additional compensation will therefore more often be whether the injured party could and should during the first case have taken into account the risk of (additional) future damage in claiming compensation for the reduction in value of the estate, cf. on this point 1949 UfR 804 (Supreme Court)—referred to in section 2 above—and, for Norwegian practice, 1941 Rt 85. In the latter case the owner had previously received compensation for certain damage to the estate, and a special risk of subsequent damage had at the same time been created. The party liable considered that the claim should have been made during the first case as a claim for compensation for reduction in value, but this was not upheld; it was not until the years following that the injured party, with reasonable certainty, could form a justified opinion on the nature and the extent of the future damage, and it was therefore found reasonable and correct that he preferred to wait. In other words, the splitting-up of the claim was justified.[63] A characteristic feature was that another main problem of the case was whether the claim was subject to limitation. A suspendable period of limitation running from the time at which the injured party became aware of, or should have been aware of, his (new) claim does not exclude the claim where conditions for making new claims are otherwise fulfilled. The problem lies only in the duration of the absolute period of limitation, the time at which it begins to run (especially where the damage does not begin to occur until long after the damaging activity) and, as previously mentioned, the interrelation with the rules of limitation in insurance law. Where damage occurs step by step—as opposed to continuous nuisance—there will normally be no doubt that compensation may be claimed in each and every case of damage—cf. e.g. 1965 UfR 761 (Supreme Court) and 1967 UfR 495 (Supreme Court); problems may, however, also arise where the first case has upheld the injured

[63] Cf. C. Stub Holmbo in *NFJFP* no. 44, pp. 18 ff.

© Stockholm Institute for Scandianvian Law 1957-2009

party's claim that certain steps shall be taken with a view to averting damage.[64]

As mentioned in section 3, there may be grounds for choosing a preliminary decision in situations lying between those where future nuisance or the risk of late effects may provide a basis for a claim of compensation for reduction of value, and those where the uncertainty is so great as to justify a splitting-up of the claim. A preliminary decision is particularly called for where the element of uncertainty surrounds assessment of whether the future nuisance will become permanent. But this intermediate solution is feasible only where the preliminary compensation is granted as a current performance. Under Danish law this solution is clearly excluded in cases of personal injury, but it is probably also excluded in cases of other types of injury. At any rate Danish law appears to lack any examples of preliminary compensation having been granted in the form of interest; whereas it has been proposed that the corresponding authority in the Norwegian Neighbour Act should be transcribed to the general regulation of compensation for pollution damage.[65] Where only preliminary decisions are taken, the possibility of a renewed review is obvious and also includes a reduction or an abandonment of compensation.

As mentioned in section 2, the Norwegian proposal that it should be possible to grant *finally* fixed compensation for future pollution damage in the form of a current performance (likewise as an extention of the rules of the Neighbour Act) was associated particularly with the possibility that pollution might be reduced within a certain time. Consequently, it was proposed also to include general provisions on renewed review (contrary to the Neighbour Act under which renewed review is possible only on the basis of price developments) so that each party may demand a renewed review at least 5 years after the last decision. The same purpose does not appear to have motivated the provisions of sec. 9 of the Swedish Environment Damage Act. It appears from the *travaux préparatoires* to this Act[66] that no major importance is attached to the provision since the difficulty in assessing future damage normally renders it "inappropriate" to fix compensation in advance. Splitting-up of the claim is therefore envisaged as the normal procedure. Should com-

[64] Cf. P. Spleth in *UfR* 1966 B, p. 120.

[65] Cf. *NOU* 1982:19, pp. 155 and 270; the provision of sec. 9 of the Swedish Environment Damage Act does not deal with preliminary decisions but merely with the question whether a compensation for future damage is to be fixed at all and, if so, in which form.

[66] Cf. *SOU* 1983:7, p. 280, and *Prop.* 1985/86:86, p. 58.

© Stockholm Institute for Scandianvian Law 1957-2009

pensation (as an exception) be granted for future damage, the rule provides that it may be fixed either as a lump sum or as a current performance but, as heretofore, it is assumed that compensation will normally be in the form of a lump sum. Only in a case of current performance is it possible to have a renewed review insofar as this is found reasonable in the light of changed conditions.

In both situations the possibility of a renewed review thus depends entirely upon the way in which compensation has been granted. One must assume that a renewed review of a lump sum awarded (i.e. a claim for additional compensation in cases of deterioration) will be limited to the procedural point of view mentioned in section 4.1.2 above, and correspondingly, that it will be contingent upon a reservation where compensation has been fixed through a settlement, cf. section 4.1.4. Such a difference between the possibility of having a renewed review in cases of lump-sum compensation and in cases of current performance may lead the parties to unfortunate speculation on how the future situation may develop, before they adopt a position on the type of compensation to be claimed.[67] If the choice of the way in which compensation is granted is also to serve more general interests, it also becomes a problem that the parties' agreement on a particular form of compensation is normally assumed to carry considerable[68] or decisive[69] weight, even though compensation may be fixed by settlement.[70]

The difference is important not the least because no provision makes renewed review contingent upon the change being a major one; in the Norwegian proposal this is explained by the fact that the stated criterion is too "arbitrary and imprecise".[71] This involves an increase in the difference from procedural rules on resumption where the requirements are qualified; and at the same time the difference between preliminary and "final" decisions is diminished or eliminated (apart from the minimum interval until revision). Apparently a desire to adjust compensation to the actual development of damage has carried much greater weight than the consideration of adjusting to the situation,

[67] This was precisely the reason why the Swedish Act introduced a rule regarding renewed review (increase) also in case of lump-sum compensation for personal injury, cf. *Prop.* 1975:12, pp. 116 and 118 ff.

[68] Cf. *NOU* 1982:19, p. 269.

[69] Cf. *Ot.prp.* no. 4, 1972–73, p. 18.

[70] Cf. von Eyben, *Kompensation for personskade*, pp. 795 ff.

[71] *NOU* 1982:19, p. 156. None the less the criterion is used in delimiting the area where it is indicated to choose compensation in the form of a current performance (expectation of a major reduction of pollution), cf. p. 269.

© Stockholm Institute for Scandianvian Law 1957-2009

whereas dogmatic considerations regarding the binding force of decisions have led precisely to the opposite in the case of lump-sum compensation.

The possibility of a renewed review should hardly be limited to (major) changes in the extent of physical damage, cf. section 4.1.3 above regarding the corresponding problem in cases of personal injury. As was explained—and as has also been stressed in the Norwegian proposal[72]—assessments of the extent of physical damage and of financial "damage" will often be difficult to keep apart. Claims based merely upon the issue of the legal principles involved in assessing known facts fall outside the area of renewed review.

5.2. *Compensation for Expropriation*

Renewed review of compensation granted for expropriation will be considered only briefly and only from a Danish point of view. It is obvious that pollution damage may occur in a completely parallel manner either through a damaging activity or through expropriation of part of an estate. Also, one cannot assume that compensation is to be fixed under different rules depending upon whether land was surrendered to the polluting enterprise or not.[73]

Hence there is no wonder that the provision of sec. 21, subsec. 1, para. 2, of the Expropriation Procedure Act regarding renewed review has not received greater attention in Danish law. The Act provides that should "major changes in the basis of the compensation granted" occur to the detriment of the party entitled to compensation for expropriation, a request for additional compensation shall be submitted for adjudication to the commission of expropriation, possibly to the courts.[74] This rule expresses nothing but the generally-applied principle, and seems of very little practical importance. None of the decisions referred to in legal writing on expropriation deal with renewed review on the basis of a subsequent increase in nuisance or the like.[75] To a

[72] Although only in relation to the choice of preliminary decisions, cf. *NOU* 1982:19, pp. 153 ff.

[73] Cf. *NOU* 1982:19, pp. 140 ff., and W.E. von Eyben, *Miljørettens grundbog*, Copenhagen 1986, pp. 198 ff.

[74] Cf. on this rule, *Bet.* 330/1963, p. 73, O. Friis Jensen in *Taksationsproces*, pp. 208 ff., and in *Dansk Miljøret* IV, Copenhagen 1978, pp. 88 ff. and 181 ff.

[75] Cf. 1976 KFE 83, where the case was not resumed "already due to the fact that the decision passed has already taken into account the significance of the noise inconvenience", whereas 1976 KFE 90 dealt with a situation where the conditions on the basis of which compensation had been fixed were not in accordance with the actual circumstances.

© Stockholm Institute for Scandianvian Law 1957-2009

limited extent, fixing compensation may be postponed; but not beyond the point where the plant has been finished, cf. sec. 18 of the Act. The rule is aimed, among other things, at temporary inconvenience in connection with plant being built.[76]

The basic position is, however, that compensation for expropriation is to be granted in advance, so that it may be fixed no later than when the decision on expropriation is taken. It is an open question whether the reasons behind this principle are also valid in situations where a renewed review becomes particularly called for, that is, particularly in relation to permanent nuisance after a partial expropriation. That no special problems appear to have arisen in practice may perhaps be because there are no limitations upon the possibility of the parties to submit new material in connection with a judicial review of the compensation; nor is there anything to stop the courts assessing compensation on the basis of such new material.[77] Not the least on account of the long waiting time at the superior courts, a major part of the future may have become the past by the time the case comes to trial.[78] But in this field too, few compensation cases are brought before the courts. The question is therefore whether there is a need for supplementing the rule on renewed review by a more far-reaching possibility of making preliminary decisions granting a time-limited current compensation extending beyond the point at which the plant is finished, and possibly also take final decisions on a compensation of interest with a possibility of renewed review, including possible subsequent reduction of the compensation.

It may be that the doctrine regarding the binding force of judgments carries less weight in Danish law than under the legal systems of other countries. On the other hand there appears a picture of another Danish doctrine—the desire to have, at almost any cost, decided all cases regarding compensation for future loss quickly and finally through lump-sum damages, despite all the associated uncertainty. Only if it turns out that compensation has been fixed in a way which is completely

[76] Cf. regarding the rule, *Bet.* 330/1963, pp. 41 and 72, and Friis Jensen, *op.cit.*, pp. 203 ff.

[77] Cf. E.A. Abitz in *Proceduren*, 2nd ed. Copenhagen 1980, pp. 452 ff., and Bent Christensen in *Festskrift til Torstein Eckhoff*, Oslo 1986, pp. 223 ff.

[78] Cf. Bent Christensen in "Erstatningsfastsaettelse ved ekspropriation", published by *Amtsrådsforeningen* in Denmark, Copenhagen 1977, pp. 14 and 21 ff. This is also relevant to the possibility of maintaining that compensation for permanent disablement shall be fixed at the time when the injured person's state of health is stable; if the case is not taken to court until several years later one is not to disregard the knowledge available at that time regarding actual development since that time. Should the injured party in the meantime have been rehabilitated the wait may therefore be costly to him!

© Stockholm Institute for Scandianvian Law 1957-2009

out of line with the actual development of damage, may the case be reviewed again. Without such anxiety to close cases, the question of a renewed review at a much later time, with all its inherent problems, would probably arise much more rarely.

6. CONCLUDING REMARKS

The general right of renewed review in cases of major unpredictable changes in the basis on which compensation was fixed, raised in the introduction by way of thesis, apparently runs into greater procedural than substantive difficulties. Admittedly, one may discern a certain tendency that the consideration of adjusting to the situation carries greater weight than it ought to, but nonetheless the major impediment appears to be too wide an extension of the doctrine of the binding force of judgments and a requirement that reservations be made where the issue of compensation is settled out of court. This approach is not tenable because the binding force of a judgment cannot include claims based upon effects which could not have been taken into account when the decision was made, and because it is unreasonable to require reservations regarding a development which one had no reason to envisage.

This study has shown that there is scant reason to distinguish between compensation for personal injury and compensation for other kinds of damage; nor does there appear to be any reason distinguishing between compensation based on general rules of the law of tort and compensation based upon insurance or expropriation. No doubt the problem is most significant in cases of personal injury where the consideration of adjusting to the situation carries the greatest weight; but this holds true also of the desire to implement the substantive rules of compensation assessment according to the actual loss suffered.

Any attempts to distinguish between changes in the extent of physical damage and changes in the financial consequences of the damage lead to major difficulties in the case of a renewed review. In like manner there is no good reason for a distinction between qualitative changes in the nature of the effects and purely quantitative changes in the extent of the effects. On the other hand quantitative changes will probably more often fall within the limits of the margin of uncertainty taken into account in the first decision. This however is just an integral part of the assessment of whether the change is a major one, which should normally be a condition for obtaining a renewed review.

© Stockholm Institute for Scandianvian Law 1957-2009

The "indirect" nature of the problem should be underlined. The issue of renewed review must be seen in the light of the intentions of the substantive rules on the fixing of compensation and the means otherwise employed for implementing these intentions, including above all the choice between compensation as a lump sum or as a current performance. Thus if one really feels that compensation for future loss should be fixed so as to grant full compensation—neither more nor less—for the individual loss, one would also have to accept the possibility of renewed review where the prognosis on the extent of the loss turns out to be incorrect. If on the other hand greater emphasis is put on winding up compensation, including the permanent effects of the damage, as quickly as possible, then it may become necessary to accept a certain standardization of the criteria for fixing compensation and this will result in corresponding limitations upon the right of renewed review. It is, therefore, necessary to have a clear conception of which of the many factors involved in the fixing of compensation should be allowed to justify a renewed review, and also whether statutory provisions on renewed review in a given area should be considered exhaustive.

Particularly in the field of personal injury, this interrelation with the substantive rules of assessing compensation makes it difficult to frame more detailed guidelines. One must recognize that the visions regarding joint Nordic reforms of the law of tort have not led to many practical results, and that in terms of legal policy this aim has not been given priority. To some this will be regrettable, but others will take it lightly. Even so, there are still such major similarities that it is fruitful to study the differences.

© Stockholm Institute for Scandianvian Law 1957-2009