LIMITATION OF DAMAGES ACCORDING TO THE CIRCUMSTANCES OF THE "AVERAGE CITIZEN"

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1. In the law of torts, there is a principle of long standing that the tortfeasor shall pay full compensation for all economic loss sustained by the injured party, unless there is express authority for a limitation of his liability. The compensation may even cover non-economic elements (moral harm, pain and suffering, etc.); the rules in this regard vary considerably from one country to another. This paper deals only with compensation for damage that can be measured in terms of money by comparatively fixed standards. Furthermore, questions of liability under contract are disregarded.

The discussion of the fundamental principles of tortious liability that has been in progress in Scandinavia since the beginning of the century has not left untouched the doctrine of full compensation. It has been contended with emphasis that damages should be assessed with a view to the economic standards of the average citizen. The contention is not that the judge should examine the financial situation of the tortfeasor when deciding whether the tortfeasor should be held liable or not. This is of course sometimes done, more or less openly; but that is not the problem here. What is submitted, rather, is that the judge should look at the injured party and should not award damages in excess of the average loss of an ordinary person in such a situation.

Henry Ussing strongly advocated this principle. As a member of the committee that prepared the draft of the Danish Motor Vehicle Liability Act—the last legislative work in which he took part—he stated that "compensation for personal injury and loss of future aliments from a deceased person should be assessed according to equity, and should not exceed the economic standards of the population as a whole".[1] In pursuance of this principle, the committee proposed that damages for personal injury and death should be limited on the basis of a yearly income of 12,000 Danish kroner (£600).[2] In the corresponding Swedish draft, Ivar Strahl advocated

[1] Henry Ussing, "Lovgivningsproblemer vedrørende Erstatning af og tvungen Forsikring mod skade ved Automobilkørsel", *Sv. J. T.* 1941, p. 767.

[2] *Betænkning (nr. 179) om ændring af reglerne om erstatning for skader voldt ved brugen af motorkøretøjer m. v.*, Copenhagen 1957, p. 18.

a somewhat higher amount, namely 20,000 Swedish kronor (£1,400).[3] Norwegian writers have endorsed this doctrine.[4]

A contention that damages should be assessed "according to the economic standards of the average citizen" may have several somewhat different meanings. A preliminary difficulty lies in determining what those standards really are. Who can be said to represent "the ordinary citizen"? This problem will not be dealt with here. But even when the legislator or the courts have established whose economic standing is to be brought into consideration, the rule may still be worked out in several ways. Before we inquire to what extent the doctrine of the "average citizen" has gained a foothold in our law, it may be useful briefly to explore these possibilities.

(a) One method would be to assess every single object damaged according to the value that such an object regularly represents to the "average citizen". According to this view, a damaged car should be compensated as a Volkswagen even if it were a Cadillac, the loss of future income should not exceed the standard earnings of the "average citizen", and surviving relatives should be treated as if the deceased's income were at the mean level. The method implies a more or less consistent *standardization* of damages. It might even imply that the compensation would exceed the economic loss, in cases where the injured party was poor.

(b) Another way would be to argue as follows. No one should be entitled to claim compensation if this would place him in a better economic position than that of the average citizen. Accordingly, one would have to put a ceiling on the recoverable amount, and deprive the injured party of a compensation that he did not need in order to keep up a "standard" way of living. His needs should be tested—a procedure well known from the law governing social welfare schemes. But if he was poor, and had sustained little or no economic damage, the compensation should not exceed the factual loss.

(c) A third method is often employed in limiting liability, and although it is based on considerations different from those ordinarily associated with the doctrine of the average citizen, it cor-

[3] "Trafikförsäkring", *S. O. U.* 1957: 36, p. 38.

[4] See for instance Dagfinn Dahl, *Erstatning og opreisning for legemsskade*, Oslo 1933, p. 80; Fredrik Moe, *Invaliditet og erstatning* (Norsk forsikringsjuridisk forenings publikasjon nr. 19), Oslo 1945, p. 14; Kristen Andersen, "Erstatningsansvar eller forsikring eller begge deler?", *T. f. R.* 1955, pp. 397 f.; and Erling Wikborg, *Innstilling fra det nordiske utvalg for lovgivning på erstatningsrettens område*, Oslo 1950, p. 18, see also p. 7.

responds rather closely to it in its effects. This method appears in the regulation of the legal responsibility of comprehensive "risk groups", such as owners of ships, automobiles, airplanes and railways, where it has often proved necessary to set an upper limit to the liability. The amount will as a rule come out as a sort of compromise between the conflicting interests, on the one hand the public wish for reparation and safety, on the other hand the economic interests of the group or professions whose activities have resulted in damage. The consequence will often be a drastic limitation of the right to claim compensation for the full economic loss.

(d) Finally, one may reach the intended standardization by abolishing the whole law of torts, leaving it to other bodies—perhaps the public department for social security, or the private insurance companies—to compensate all losses according to prearranged tariffs. When making such tariffs, the legislator may limit or standardize the damages as much as he likes. The existing rules to this effect do not, of course, belong to the law of torts, but one should certainly not overlook the fact that civil responsibility and social legislation are closely interrelated. This interconnection will probably be considerably strengthened during the remainder of this century. A profound knowledge of public and private insurance is indispensable to anyone who seeks the solution of the fundamental problems in the law of torts.

2. The first time the Norwegian courts had to consider a contention that damages should be limited according to the economic standards of the average citizen was in a suit brought before the courts in 1877.[5] The case illustrates a rather special aspect of our problem, viz. the effect of unnecessary luxury on the question of compensation for damage to property. Two dogs had been fighting in the main street of Oslo, or Christiania, as it was called at that time. One of them—according to the documents "one of the biggest dogs in town"—ran against a plate-glass window and broke it. The window was insured, and the insurer brought a suit to recover the insurance indemnity from the owner of the dog, a student. The claim comprised the full value of the plate glass. The student denied every responsibility, alternatively contending that his liability could not exceed the far smaller costs of replacing the broken window by an ordinary glass one of the same size. The

[5] 1877 N. Rt. 828.

City Court found for the defendant on the grounds that no negligence had been shown, but on appeal the Supreme Court ordered him, by four votes to three, to pay the full costs of replacing the window with plate glass. The majority held it negligent to allow a dog of such a size to gambol around on its own; the minority held that, on the one hand, no negligence had been committed and, on the other hand, the owner of the window was at fault by not having protected it by an iron railing.

From our point of view, however, the interesting point is the dissenting vote in the City Court of Judge (later Professor) Oscar Platou. He would hold the student liable for the costs of replacing an ordinary glass window, because, as he said, plate glass was a luxury, and anyone who wanted to indulge in luxury should do so at his own risk. In the Supreme Court, Mr. Justice Thomle found it necessary to state that "plate glass had now become so usual that it cannot be considered an exaggerated or unnecessary luxury". He also underlined "to what inequitable results this new doctrine would lead", and that the courts could not apply the doctrine without guidance from statutory regulations.

Platou repeated his contentions and further elaborated them in a paper published in *Retstidende*.[6] He cited Capito, Proculus and Ulpian in support of the doctrine that a negligent neighbour could only be held liable for damage to house and ordinary chattels, not for the destruction of luxurious fittings and furniture. He showed how these ideas had been adopted and elaborated by Mommsen and Ihering, among others, and contended that they had even inspired today's law in certain fields. The following statement, which to us seems rather naïve, clearly points into the future: "With technical progress, panes of glass have become bigger and bigger. One day we may find that a whole wall many yards long has been taken out and replaced by one single pane, or people may even adopt the luxurious habit of putting more or less valuable glass paintings on the pane for advertising purposes. Should all this be compensated for? How far should we allow the proprietors to expose the public to the risk of being held liable?"[7]

However, in spite of a technical and economic development far surpassing his prophecies, Platou's view has not left any traces in positive law as far as damage to property is concerned. Apart from some very special cases, the rule still is that tortious and other liability comprises the full economic loss. There are a number of

[6] *N. Rt.* 1879, pp. 1 ff.
[7] *Op. cit.*, p. 12.

factors reducing the need for a standardization of damages in this field: the extension of property insurance, the fact that the insurers to a great extent abstain from their right of subrogation, furthermore that the owners of valuable property on the whole are better off than the negligent tortfeasors, and probably refrain from suing them in many cases where the compensation is not recoverable or where the full liability would mean ruin to the other party. Of great importance, too, is the extended use of liability insurance, both the ordinary insurance against everyday risks, and the special types, such as motor traffic and enterprise liability insurances.

3. The champions of standardization want to apply the doctrine to property damage as well. It has been contended that an owner of exceptionally valuable things who exposes his property to public risks should insure his property or stand the risk himself.[8] But it is within the field of compensation for loss of future earnings through personal injury and loss of future aliments through the death of a person that the doctrine has its most ardent advocates, and the documentation that follows will be limited to this field. Before reviewing the problem in Norwegian law, it may be of interest to see how the law stands in (a) Denmark and (b) Sweden.

(a) In *Denmark,* a number of writers have lately pointed out that the courts have laid down very precise rules regarding the assessment of compensation for personal injury and death.[9] This tendency was made the object of a statistical investigation by Stig Jørgensen, Professor of Law at Aarhus University, in his thesis for the doctorate.[1] There he advanced the hypothesis that compensation for loss of future income appears as the product of the

[8] See especially the above-mentioned paper by Kristen Andersen.—Ussing and Strahl would only apply the principle in two cases: as far as fire risk to real property is concerned, and when industrial and other enterprises prefer to stand as self-insurers. See Ussing, *Nordisk lovgivning om erstatningsansvar,* Copenhagen 1950, p. 48, and Strahl, *Förberedande utredning angående lagstiftning på skadeståndsrättens område,* Stockholm 1950, p. 123.—A very modest concession to these ideas is found in the Norwegian draft of the Motor Vehicle Liability Act, sec. 5. The Traffic Accident Insurance (which is about to replace the present strict liability of the owner of the vehicle) will not allow compensation for a passenger's personal belongings lost in a car accident, apart from "ordinary clothes and other ordinary objects for personal use".

[9] See, *inter alia,* W. E. von Eyben, "Erstatningskravets størrelse", *Sagførerbladet* 1950, p. 160; H. Funch Jensen, "Nogle erstatningskrav i færdselssager", *Fuldmægtigen* 1959, p. 1.

[1] Stig Jørgensen, *Erstatning for personskade og tab af forsørger,* Aarhus 1957.

degree of invalidity (as defined in the tariffs used by the Danish Public Accident Insurance), of the mean annual income of the claimant, and of the factor of capitalization fixed by the Ministry of Labour and Social Aid for use by the Public Accident Insurance, the whole to be multiplied by two-thirds, because the said insurance only covers two-thirds of the factual income of its members. However, this mode of calculation is only operative as long as the factual income varies between 7,000 Danish kroner and 12,000 kroner (these figures have reference to positive rules governing the public accident and health insurances). If the factual income falls below 7,000 kroner or exceeds 12,000 kroner, the difference is not taken into account. A widow (still according to Jørgensen) is given a lump sum representing four times her deceased husband's yearly income, and the children are awarded a sum amounting to one and a half times his yearly income, the compensation decreasing to nil if the child has reached the age of 18. Even in these connections, "income" means the standardized amount varying from 7 to 12 thousand Danish kroner (£350–£600).[2]

One may of course—on the basis of the same or similar statistical information—question whether these formulae give an exact description of what happens in Danish courts. But it is an unquestionable fact that the courts award very small, and strongly standardized amounts of compensation for death and invalidity. It is probably true that they would reject any claim based on incomes which surpass the average earnings of skilled labourers. Jørgensen personally endorses this legal practice, which he finds both equitable and adequate.[3]

Against this background, it is surprising to see that Danish courts assess and compensate the full economic loss sustained up to the date when final judgment is given. Until this time, no standardization or levelling is applied to the personal incomes for which compensation is to be paid.[4]

(b) Turning to *Sweden,* we meet a totally different picture. The above-mentioned recommendations of Professor Strahl have met with little favour among Swedish lawyers. The courts try to evaluate the actual economic loss in every single case, and put no maximum or minimum limit when assessing the income of the

[2] *Op. cit.,* pp. 184 f., 197 ff., 244 ff.

[3] See especially Stig Jørgensen, "Personskade og grundsætningen om fuld erstatningspligt", *Nordisk Försäkringstidskrift* 1958, pp. 119 f.

[4] See Jørgensen, *Erstatning for personskade og tab af forsørger,* pp. 146 ff.

deceased (or injured) person. They evaluate the degree of invalidity according to the circumstances of the case, taking little account of the tariffs of the Industrial Injuries Insurance. It should also be pointed out, first, that this insurance gives a much better cover than do the corresponding Norwegian and Danish institutions, and, secondly, the injured party remains entitled to make excess claims against the person responsible for the damage.[5] In Norwegian law, such claims are (for all practical purposes) disallowed, and in Danish law up to 1959, they could only be raised with special permission.

4. In Norwegian law, claims regarding compensation for loss of future income and of aliments are regulated by secs. 19 and 21 respectively of an Act of May 22, 1902, putting into force the Penal Code. We cannot here go into the history of the rules, nor the differences of opinion regarding their interpretation. Suffice it to indicate that the great Norwegian scholar Fredrik Stang ardently advocated the doctrine which will be described below.

According to both sections of the Act, the compensation shall be assessed to the amount "which the judge finds equitable, taking into account the fault and the other circumstances of the case". Apparently, the provisions give the judge a wide discretionary power to fix an equitable compensation within the limits of the actual economic loss. He might even be allowed to consider things like the tortfeasor's assets, or the claimant's need of economic help. According to Stang, however, this is not the correct interpretation. The basic assumption, even in this rule, is that a person has sustained an economic loss that should be assessed and compensated within the ordinary framework of the law of torts. The true meaning of the dispositions would therefore be that they authorize the judge to grant an increment, to be on the safe side, in excess of the loss proved, in cases where it is especially difficult to evaluate the factual loss.[6]

Undoubtedly the courts have been greatly influenced by Stang's doctrine. One may point to a number of *dicta* from the Supreme Court to the effect that the full economic loss should be compensated, in so far as it can be ascertained. Thus, in a decision of

[5] See Halvar Lech, "Ersättning för invaliditet och förlust av försörjare", *Nordisk Försäkringstidskrift* 1958, p. 130.

[6] Fredrik Stang, *Erstatningsansvar*, Kristiania (Oslo) 1919, pp. 421 ff. See also Emil Eriksrud, *Erstatning for tap i fremtidig erverv* (Norsk forsikringsjuridisk forenings publikasjon nr. 37), Oslo 1957, pp. 15 ff.

1948,[7] the Court held that a housewife who had been run over by a car "should be compensated for the full economic loss she has suffered by the accident, both in the form of loss of future earnings and in the form of direct loss". But probably one must not conclude from this and similar statements that the Supreme Court has accepted the "full loss doctrine" without reservations. The statements are generally found in cases where the defendant has alleged that the compensation should be reduced for special reasons (such as contributory negligence), and where the claimant's resources are so modest that an "average citizen" limitation would be out of place.[8]

The question whether the courts may award an amount less than the ascertained economic loss was discussed, but not settled, in a case of 1947.[9] The Drammen City Court discussed the case in detail, but the Supreme Court declined to take up the point, saying that, at least in this particular case, it would not be proper to award a compensation inferior to the ascertained loss. One judge voted for a lower amount, and stated—rather as a general expression of opinion—that the court was free to assess the compensation according to all the circumstances of the case, and even to award a smaller amount than the actual economic loss. Another of the judges strongly opposed this statement, and said that, in his view, the court had no right to award an amount which the court itself knew to be insufficient to compensate the claimant for his loss.

A series of decisions from the last few years seem to show that the Supreme Court tends to support this last opinion. In all these cases there is the common feature that a man in the prime of life has been severely disabled by an accident for which a solvent institution is responsible. There have been several cases of accidents to people in the armed forces. The amounts of compensation have shown a tendency to increase from case to case, as the Supreme Court has obviously tried to take account of the progressive decline in the value of money. The largest amount so far awarded is 206,000 Norwegian kroner (£10,300), the beneficiary being a 20-year-old student in a commercial school who suffered serious cerebral injuries after an accident on a military rifle range.[1] In

[7] 1948 N. Rt. 345.
[8] See, *inter alia*, 1951 N. Rt. 687.
[9] 1947 N. Rt. 101.
[1] 1956 N. Rt. 278.

this case, as well as in another[2], the Supreme Court expressly stressed the fact that, prior to the accident, the injured person's prospects were promising, being far above the average, and that he must be given an amount sufficient to compensate for the lost expectations.[3]

It is impossible to lay down with certainty that the claimants received "full" compensation in these cases, because one lacks an objective standard for measuring the economic loss. But one may ask whether the Supreme Court *tried* to give full compensation, or whether it hesitated when it came to drawing the exact conclusion from the financial calculations on which the claimant based his claim. It is in fact impossible to answer this question, since the Supreme Court never allows an amount to appear to be the result of a mathematical calculation. Accordingly, some space is always left for the Court's discretion.[4] But it should be mentioned that Stig Jørgensen, in the thesis mentioned above, says that the Norwegian awards for loss of future incomes correspond fairly well on the whole with the calculated value of the real expected income.

5. In some decisions, however, the Supreme Court has clearly examined the economic needs of the claimant, and has reduced the award because it considered that the individual concerned would probably receive adequate compensation from the awarding of a somewhat lower amount. This tendency has been most apparent in cases concerning loss of future aliments from a deceased

[2] 1956 N. Rt. 605.

[3] For other decisions, see 1949 N. Rt. 212 and 1956 N. Rt. 371, 1951 Rettens Gang 502 and 1954 *ibid.* 610.

[4] A Supreme Court decision from 1959 (1959 N. Rt. 1073) throws light on the process of assessing the damages in these cases. An architect had cerebral disturbances after a train accident and was awarded 130,000 Norwegian kroner (£6,500) for loss of future earnings. Some years later, it appeared that he was doing a job as an architect with a fairly good salary and that he had been negotiating for a similar job, which he got, at the time of the litigation. The defendant claimed that the decision should be revised, and contended that the result would obviously have been less favourable for the architect if the latter had given full information. The claim was unanimously rejected. The Court underlined that "the amount of damages awarded to the architect did not emerge as the result of calculations based on a certain degree of invalidity. The compensation was assessed by the Court's discretion and in accordance with equity. Other factors, such as the negligence shown by the defendant, have also been considered..." What the architect was negotiating for at the time of the litigation was a temporary engagement in order to test whether he was able to do a job or not, and it was not obvious that full information regarding this arrangement would have altered the Court's view of the case.

person. The most striking illustration is found in a case of 1950.[5] An able and wealthy manager of an industrial firm was killed in a bus accident in 1946. He was survived by his wife and by three children, all minors. His yearly earnings had been about 65,000 Norwegian kroner (£3,250), which at that time was a considerable sum in Norway. His private estate amounted to about £35,000, the greater part of which consisted of shares in his own firm. The firm awarded his widow supplementary pensions, which, together with the regular pension and the interest on the capital, gave her a yearly income of 30,000 kroner (£1,500). Apart from this, her husband had a life insurance from which she received 150,000 kroner (£7,500) in cash. She sued the insurer, who had covered the bus owner against third party liability, and claimed in her own name, and in the name of her children, the maximum sum insured, 50,000 kroner (£2,500). As, according to Norwegian law, owners of motor vehicles are strictly liable in respect of passengers, the only point at issue was whether the survivors "merited" such compensation. The claim was rejected by the Supreme Court, by three votes against two.

The majority strongly underlined that the claimant and her children were better off than most people in Norway. The relevant legal rule only gave them an equitable right to be compensated for their loss according to the circumstances of the case, and the "circumstances" were found to be against them. They had suffered no loss that ought to be compensated.

There was a complicating factor, namely sec. 25 of the Insurance Contract Act. This section states that when a stipulated sum is paid under a life or accident insurance, such sum shall not be taken into account when assessing the amount to be paid by the tortfeasor to the injured party, and the insurance company has no right of subrogation in such a case. The majority—who for reasons of principle desired a free hand in taking into account any life insurances when awarding the compensation for death by misadventure—expressly held that sec. 25 of the Insurance Contracts Act had no application in the case.

The two dissenting judges both upheld the claim. One of them thought it improper to take into consideration the *ex gratia* pensions offered by the firm, whereas the other wished to apply sec. 25 of the Insurance Contract Act and to keep the life insurance out of account. In the view of both judges, the economic circum-

[5] 1950 N. Rt. 573.

stances of the survivors were not, apart from these assets, so favourable that a claim for compensation should be rejected.

The effects of this decision may be summarized as follows:

(1) The Supreme Court has definitely laid down that compensation for loss of aliments from a deceased person may be assessed at a smaller amount than the proved economic loss.

(2) When estimating the proper compensation, the Court may consider life insurances as well as any gratuitous aid. The whole economic picture must be taken into consideration.

(3) The economic means of the survivors should be examined; those who are well off are not entitled to compensation. The decision does little in the way of drawing the borderline, as there will be very few Norwegian widows left with nearly £50,000 in capital and a yearly income of some £1,500 (1946 value). One is tempted to believe that the courts will tend to be rather liberal, since two of the judges in the case in question wished to allow the claim, disregarding such relatively unimportant items (for the total picture) as £7,500 in cash or an *ex gratia* pension of £500 per annum.

In two subsequent cases,[5a] the Supreme Court has had to consider the effect of life or accident insurance on compensation claims. In one of them, a highly skilled architect who suffered cerebral disturbances after a train accident received an accident insurance payment of approximately £3,000. At the time of the litigation, his professional prospects were very poor. The Supreme Court awarded him full compensation (£5,000) for earnings lost during the time that had elapsed between the accident and the final judgment, and £6,500 for loss of future earnings. It was expressly stated that the accident insurance was taken into account while assessing this latter amount. In another case, a woman whose husband had been killed in a car accident and who had been left with two children and very modest possessions (a house and a lorry) received £200 on a life insurance policy taken out on her husband's life. The Supreme Court expressly disallowed the defendant's contention that the life insurance should be taken into account.

It follows from these cases and others that the Norwegian courts assess compensation for life and health according to the circumstances of the individual case. No tendency towards standardization can be traced. As a main rule, the courts also seem to award

[5a] 1956 N. Rt. 605, 1957 N. Rt. 246.

full compensation for the ascertained economic loss. But the "average citizen" doctrine has obtained some foothold, in the form of a liberal assessment of the economic needs of the claimant. The compensation may be reduced—or the claim may even be totally rejected—when the claimant is well off. A reduction of this kind is especially likely when the accident has given rise to a substantial insurance claim. The courts are probably apt to pay more attention to insurance sums than to other assets of corresponding magnitude.

6. In order fully to understand the Norwegian law of torts in this respect, it is also necessary to consider the various positive limitation rules, which may at times result in a ruthless cutting down of the compensation.

(a) First must be mentioned the exemption from liability interwoven with the system of social insurance in favour of victims of accidents sustained at work and in military service. The employers pay the insurance premiums under the industrial injuries insurance scheme (formally at least—in reality, the wages would probably have been that much higher had there been no premiums to pay). A new Act for compensation of victims of accidents at work came into force on January 1, 1960, and vastly enlarged the field of application of the compulsory insurance against such accidents. This now covers all persons who work for a salary or wages, and some other groups, such as students, school-children and self-employed fishermen. The Act excludes excess claims not only against the victim's own employer, but also against any other employer who pays premiums under the scheme. According to an Act of 1953, the State pays victims of military accidents according to fixed rates, and is absolutely relieved of liability for excess losses. In consequence, a very substantial part of all claims for personal injury is lifted out of the general law of tort, these losses being regulated according to independent and self-supporting schemes.

The Norwegian Directorate for Social Insurance *(Rikstrygdeverket)* generally gives compensation in the form of periodical payments to the victim or to his survivors. The rates for this relief have been heavily criticized;[6] it has been said that they only enable the recipients to live on the edge of starvation. The post-war inflation, especially, has progressively reduced the purchasing power of the periodical payments. The indemnification for military ac-

[6] Kristen Andersen, *T. f. R.* 1955, p. 388.

cidents is clearly insufficient, and this may be due to the fact that recruits generally have very small incomes before entering the service and therefore may be said to suffer only a modest economic loss by being deprived of their earning capacity (the writer does not agree with this argument).[7] The rates for accidents at work have recently been raised substantially, so that the maximum is now 8,400 Norwegian kroner (£420) a year for a fully disabled person, with some extras payable in special circumstances.

It is clearly impossible to say whether the indemnification of the victims of accidents at work is "adequate" or not without entering into a detailed analysis of factors like purchasing power, other pecuniary advantages given to disabled persons (supplementary social aid, relief from taxation etc.), support regularly received from family members or other groups, etc. The periodical support does not allow the victim to keep up his previous standard of living; this follows from the mere provision that the indemnification shall basically correspond to 60 per cent of his yearly income ("income" for this purpose not exceeding 14,000 kroner). Whether or not it gives him a decent living is impossible to say; this depends, *inter alia,* on what one means by a "decent living". It is a question of policy how much the industrial and other enterprises shall be compelled to pay, in the form of premiums, to support those who have suffered harm or damage from their activity. Here we shall only underline some features of the scheme, which may to some extent answer the critics of the rates of indemnification.

First, the Norwegian Directorate for Social Insurance may on application make the relief available partly or wholly in the form of a capitalized amount. This, as well as the extensive rehabilitation activities supported by the State, are important links in the effort to help disabled individuals to earn their own living.

Secondly, all payments, the whole contact between the Directorate and its "clients", are carried on through the medium of the local social assistance office. These offices have a thorough knowledge of the receivers of assistance and may give valuable advice to the Directorate on matters like payment of extras, capitalization of the support, etc. In these respects the social insurance system has a great advantage over the law of tort; one can maintain contact with the victim and help him to use his compensation in a reasonable and profitable manner.

[7] Eriksrud, *op. cit.,* p. 42, states that recruits very often find it necessary to supplement the State insurance by a private collective insurance against accidents.

Thirdly, when capitalizing the periodical assistance, one arrives at figures which may compare favourably with the compensations awarded by the courts for a corresponding degree of disablement. The insurance rates may even prove better for the victim, as they are applied automatically, with no preliminary testing of his economic needs.

(b) According to Norwegian law, the owner of a car or other motor vehicle is strictly liable for damage caused by the use of the vehicle. He must provide a guarantee for possible casualties—usually in the form of an undertaking from the insurer who covers his third party liability risk—but in consequence of inflation the legally defined minimum amount has become grossly inadequate (20,000 Norwegian kroner, or £1,000, for every person injured, not exceeding 60,000 kroner (£3,000) in all for a single accident). Surprisingly few people in Norway cover themselves against liability exceeding the prescribed minimum, and a rapid survey of the court decisions makes it clear that compensations awarded to the victims will very often be limited in the same way. In the vast majority of cases, the car owner himself has no assets, and the claimant will limit his claim to what may be extracted from the guarantee.[8] In practice, therefore, the insufficient insurance cover will imply a corresponding limitation of the compensation obtained by the victim.

At the time when the minimum guarantee was fixed, 20,000 Norwegian kroner may perhaps have equalled the economic loss involved by the decease of an "average citizen" (though even at that time, court decisions awarding higher amounts occurred). Recently a statute has been enacted concerning motor accident liability and insurance, providing for a maximum insurance cover of 200,000 kroner (£10,000) for every person wounded or killed. The car owner may be held personally liable for excess losses, unless such liability would be contrary to equity and the circumstances of the case. Assuming that the excess liability will in practice play a modest role, the limitation of the insurance cover to 200,000 kroner will in fact mean a serious limitation of the right to recover for the full economic loss in cases of death or major disablement.

(c) Even in the case of accidents caused by ships and aircraft, the legal limitations of the owner's responsibility may seriously affect the victim's right to compensation.

[8] See, *inter alia,* 1948 N. Rt. 345, 1953 N. Rt. 513 and 1953 N. Rt. 1517.

In maritime accidents occurring in inter-Scandinavian traffic, the shipowner will generally have exonerated himself from liability exceeding the prescribed minimum of 20,000 Norwegian kroner (£1,000).[9] In international traffic, the shipowner is free to exonerate himself totally (except for liability arising out of his own gross negligence), and most passenger tickets will contain stipulations to this effect. But even when the shipowner incurs responsibility, the victim may be deprived of indemnification because of the limiting of the owner's total liability. If a local passenger vessel is lost with some 100 fathers of families going to spend a summer week-end with their wives and children on holiday, there will be very little compensation to each one of the dependants.

The Brussels Conference in 1957 voted a draft convention regarding the liability of shipowners towards their passengers, raising the minimum (and in practice the maximum) responsibility to the equivalent of £6,000 for each person injured or killed. The same conference finally adopted a new convention on the limitation of the aggregate liability falling upon the shipowner, considerably increasing the amounts. But still the owner of a ship of 300 tons does not incur a greater liability than £22,500, or maximum compensation to 3–4 victims.

In airplane accidents there is in Norway no limitation of the aggregate liability. But according to the Civil Aviation Act of June 12, 1936, the liability *per capita* is limited to 60,000 Norwegian kroner (£3,000), unless a higher amount is stipulated. An international proposal to double this amount has been put forward.[1]

The limitations here mentioned—for motor vehicles, ships and airplanes—are of course not motivated by a wish to curtail the victim's compensation on an "average citizen" basis. However, such limitations would hardly have been acceptable unless the prescribed amounts had in some way been considered fair compensation for a major accident to an average traveller. But inflation, of course, tends to make all such maxima inadequate long before the law is changed.

7. There is a good deal of legislative work going on in cooperation between the Scandinavian countries in the field of tort law,

[9] Maritime Code of July 20, 1893, sec. 171, subsec. 3. A corresponding rule is inserted in the other Scandinavian Maritime Codes.

[1] At the ICAO conference in the Hague, 1955. This convention is not yet in force.

and there will probably be even more in the future. There is every reason to raise the question: Should we, or should we not, incorporate the "average citizen" doctrine in our statutes and in our way of thinking? The question has two aspects which are rather different from each other:

(a) On the one hand, we have the statutes regulating the responsibility of certain specified categories of tortfeasors. Here we find primarily the legislation concerning accidents at work and military accidents, but also injuries sustained on the road, at sea or in the air. The only practicable and safe way of regulating the indemnification of the victims of such accidents seems to be through compulsory insurance. Whether such insurance should be organized by the State or by private companies is in this context a question of minor importance.

Everyone agrees that the victims of these accidents should get as much as possible, within the framework of their economic losses. But it seems equally necessary also to watch the interests of those who own the cars and ships and planes and factories, as these are the people who are going to pay the insurance premiums. Substantial compensation means substantial premiums, in the transport sector as well as in general industry. The final consideration is this: What standard of living can we afford to give to our widows, orphans and disabled persons? And in the next place: Are we all willing, in our capacity of salary- and wage-earners, and of citizens, to give the disabled their share by showing some restraint in our wage claims, or by supporting extensive and costly programmes for social security? There are few who see these interrelations, and even fewer who show the necessary restraint.

The great number of casualties each year within these categories should also justify a certain standardization of the compensations paid. Within the Norwegian system of social insurance against accidents at work, there has been a very strong tendency towards a rigid normalization of the tariffs. The trend now seems to be reversed, the Norwegian Directorate for Social Insurance being empowered to use its discretion within certain limits. In the other branches the traditional pattern of tortious or strict liability connected with liability insurance has so far been preserved. This implies that the victim has more or less received full compensation for his individual economic loss (cf. *supra,* sections 4 and 5), provided that the liability insurance and the assets of the person responsible have been sufficient. If we are going substantially to

raise the sums of the compulsory insurance, for instance for car owners, one must also consider whether claims for excess liability should be allowed. There is a growing feeling that such claims should be limited to cases of intentional and grossly negligent wrong-doing. When the car owner has been compelled to take out an insurance which for all practical purposes will cover the economic loss that may follow from the use of his car, he should be protected against the risk of losing his private resources in a suit for excess liability. The greater the compulsory insurance, the less will be the risk of excess claims, but the more inequitable will such a claim be felt to be by the person who is exposed to it.

(b) On the other hand there is the problem: What is to be done about casualties falling outside the scope of the special legislation? When the general rules of tort law apply, should one then use a sort of "average citizen" limitation when dealing with claims for personal injury?

These claims are much less numerous than those arising out of accidents at work, etc. But the choice of solution is of greater interest from a legal point of view; if one establishes a general limitation of this kind, it will apply regardless of the cause of the damage, and tend towards a remodelling of fundamental principles of the law of tort. Once established, the doctrine could hardly be restricted to claims for personal injury, but would probably be extended to the field of property damage as well. Should we, or should we not, standardize all compensations according to the values possessed and represented by "the average citizen"?

It is obvious that our answers will to some extent be coloured by our personal feelings and prejudices. A person who considers it unjust that some people should have higher earnings and possess more valuable things than others will feel it even more unjust that this inequality should, in a way, be guaranteed by the rules of law. But there are also a number of rational arguments on both sides.

It has been said that a massive standardization is indispensable for technical reasons. How, it has been asked, could the Police Court in Copenhagen decide eight traffic claims per day if the assessing of damages were not a highly standardized procedure?[2] This may be true for Denmark, but in Norway conditions are in fact different. Relatively few claims are brought before the courts, whose decisions will mainly be of value through the guid-

[2] W. E. von Eyben, *Sagførerbladet*, 1950, p. 161.

ance they give to insurance lawyers and others who are working out the compromise solutions. There is no reason to believe that the Norwegian courts are unable to base their decisions on thorough investigations of the facts of each case submitted to them. Why cannot the insurance lawyers do the same? One may also point to the recent tendency towards a more individualizing method in social insurance against accidents at work.

It is also said that the "average citizen" doctrine is necessary in order to protect the tortfeasors from being ruined. The writer believes, however, that the picture of the ruined defendant is largely a distorted one. Most people with possessions of any importance probably take out adequate insurance against third party liability; at least one may presume, when framing the legal rules, that they do so. Individual hardships may also be overcome by taking into some account the assets of the tortfeasor, in the relatively few cases where the responsibility hits him personally. This is a far better solution than reducing *all* claims, even in the numerous cases where there is an adequate insurance or where the liability is of little consequence as compared with the financial reserves of the responsible person or enterprise.

When turning to those tortfeasors who own nothing, it is plain that the choice is of no consequence at all, since no one will even take the trouble to sue them. And those who have a little money saved will be as severely hit by an "average citizen" claim as by a claim for the full economic loss, if they have not taken out insurance.

In the end, this also turns out to be an economic question. How much can people spend on the defence of their savings by way of insurance premiums? There is nothing to indicate that the cost of general third party liability insurance is prohibitive, although the indemnifications awarded by the courts have mainly corresponded to the full economic loss.

It is true that there is great uncertainty involved in the assessing of the individual economic loss by death and major disablement. The difficulties are due first and foremost to the fact that one must make prophecies concerning the future development. These prophecies have regard to the hypothetical development ("What would have happened to the victim, if he had not been killed or disabled?") as well as to the factual events ("What will happen to him in the future?"). Purely personal factors must be taken into account, and it cannot be denied that the subsequent fate of the claimant may well upset all the judge's conscious calculations. This

may be said to argue in favour of a certain standardization, especially because obvious overcompensation may offend the public's sense of justice. But this argument is only valid as long as the judge is compelled to assess an indemnification that shall compensate the victim once and for all for all the unfortunate consequences of the injury. Perhaps here we have a key to a useful reform. In Swedish law, compensation for future losses (by personal injury) is awarded in the form of periodical payments, and the duties of the tortfeasor may to a great extent be revised when later developments render the payments inadequate for some reason or other. If a disabled person in Norway dies the day after he has obtained a final judgment in his favour, he will leave a large fortune to his heirs, which is probably not very equitable.[3] Perhaps we ought to follow up the individual cases, even those which were disposed of according to the general law of tort. The first step would be to find out how the compensation is in fact disposed of, what the disabled persons, widows and children do with the money they have been awarded. This would be a rich field for sociological studies.

This, however, leads us inevitably to another problem, which is mainly of a psychological nature. How will the recipients of the indemnification react to such a periodical inspection of their personal circumstances? It is a well-known fact that so long as the case is not settled and finally regulated, the victim is usually not inclined to do his best to overcome his handicaps. It is important that he should face the situation as early as possible, and try to make the best of it. A rule to the effect that a person who constantly failed could claim additional compensation might seriously hinder the progress of rehabilitation. It is possible that Swedish lawyers have had some experience in this field which might be useful, and the same applies to the officials of the Directorate of the Social Insurances.

A definite danger involved in standardized indemnifications is the risk of inflation. It is true that the courts may take into account the price level at the time of the litigation, but we have had discouraging experiences in those fields where maximum amounts have been laid down by statute.

One could certainly put forward other rational arguments for or against the application of an "average citizen" doctrine in the

[3] Unless the heirs were supported by him. In this case, there is no real difference between compensation for disablement and for loss of future aliments.

law of torts. In the end, however, the answer will spring from personal intuition and sense of equity more than from an intellectual weighing of pros and cons. One must make up one's own mind on the basic question: Is it equitable that the wrong-doer should be compelled to maintain the victim's standard of living for the rest of the victim's life, however high this standard of living may be? Or would justice be satisfied with some modest aliments, which, in the absence of individual insurance, would be just sufficient to keep starvation away? On this, everyone's standpoint must be personal, and my answer will be a personal one.

In the law of tort, *the economic loss* has hitherto been the accepted point of departure for the assessment of damages. I fear the consequences of an abolition of this principle. It may start a development, the direction and results of which we cannot today fully foresee. This is particularly so if the "average citizen" doctrine is also applied in cases of damage to material objects.

I must, however, agree with the considerations underlying the above-cited Supreme Court decision, refusing to allow the well-off survivors of a rich business man to sue for their loss.[4] I read the opinion as follows. If the victims, in spite of the accident, will still be considerably better off than most people in our community, it is not equitable that they should have the right to sue the tortfeasor. Whether or not this decision drew the borderline correctly is another question. A factor that must inevitably influence the decision is whether or not there is an adequate liability insurance behind the person responsible. If there is such an insurance (as there was in the case mentioned) the claim will ruin nobody, even if the cost of the insurance is also a factor to be taken into account. In such a case one should probably not envy the victim his compensation unless it is established beyond doubt that his private means will enable him to keep up his way of life, to preserve his social intercourse and habits and his existing social position for the rest of his life (or—if the victim is a child deprived of his supporter—to get an education according to his abilities and social position). If there is no liability insurance, and the tortfeasor will be ruined by the full claim, the position is much more difficult. In such a case, one should probably give considerably more attention to the victim's own financial means when assessing the amount of damages.

One aspect of the victim's own financial status will be the in-

[4] See *supra,* section 5, note 5.

surance sums (whether from a life or an accident insurance) which the accident gives him the right to receive. As previously mentioned, Norwegian courts will probably pay *more* attention to such sums than to other assets of corresponding size. In my opinion, there is reason to give *less* attention to the insurance sums than to other resources. One of the main arguments for standardization of damages is that anyone who considers his own life or health to be of outstanding economic value can take out an insurance. But then one must ensure that the insurance benefits are received in addition to what he gets from the tortfeasor. An amount awarded by a court as a substitute for life or health will probably prove insufficient as "full compensation" in ninety cases out of a hundred, even if it was not "standardized". The prudent man, who has paid his premiums in order to safeguard himself or his survivors, ought to receive as a total substantially more than someone who has merely trusted in Providence. If the insurance sum is to be taken into account as a sort of cash compensation for injury inflicted on him by the tortfeasor, the insurance will in reality not improve his position at all. I cannot see that this is an equitable solution.

Here again, however, special attention should be given to the tortfeasor's position. If the full weight of the responsibility would ruin him, there is probably nothing to do but to reduce the award to an equitable amount, and offer the victim the cold comfort of praise for his foresight.

My view may be summarized in this way. Compensation for life or health will as a rule prove inadequate. The security of the victim should be a major concern, and one should not grudge him his private insurance, even if this comes in addition to a "full loss" compensation. Equitable reasons for reducing the amount of damages may be found in the tortfeasor's economic circumstances, but not ordinarily in those of the victim.