

# A Survey of Icelandic Tort Law

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## 1 Introduction

Icelandic tort law is broadly similar to that of the other Nordic countries. Until recently practically all Icelandic general tort rules were based on case law. *The Tort Damages Act 1993* (TDA) (Skadabótalög nr. 50/1993) established various general rules concerning matters which up to that time had scarcely been addressed if at all in statutes. This Act was modelled on the Danish Damages Liability Act of 1984. In most principal aspects, the Icelandic Act was identical to the Danish Act. The Acts Nos. 42/1996 and 37/1999, on the other hand, made substantial changes to the provisions of the TDA concerning damages for personal injury or death. In what follows, the amendments made to the TDA by the aforementioned acts of 1996 and 1999 are taken into account (*cf.* in particular Sections 11.2-11.6).

The Act contains a rule on contribution between multiple tortfeasors (see Section 7 below), a general rule on modification of liability on grounds of reasonableness (Section 9), a rule on the liability of employees for loss due to their negligent behaviour in the course of employment (Section 10), a general rule on damages for non-pecuniary loss and rules on the assessment of damages for personal injury or death (Section 11). It also contains rules on the impact of private insurance and other collateral sources on tort liability (Section 12). Some provisions of the TDA cannot be waived where departure from them would be to the detriment of the injured party. The same applies to certain other provisions regarding the tortfeasor. However, parts of the Act can be modified by mutual agreement made after a loss has occurred.

The TDA is not a comprehensive piece of legislation in the sense that it contains rules on all or most of the main principles of tort law. For example, it does not include general rules on the basis of tort liability; nor do the principles of the Act form a unified system. For this reason, the individual rules of the Act described below are explained in the broader context of the traditional system of tort law and the law of damages. The reader should remember that some important tort principles have not been enacted in statutes.

What follows is a broad description of the main rules of *non-contractual* legal liability in Iceland. No attention is given to such matters as burden of proof,

causation and remoteness of damage. Procedural questions are not dealt with, but it should be pointed out that there are no juries in Iceland.

No account is given of alternative remedies, with the exception that Section 12 contains a short discussion of the relationship between tort law and other compensation systems.

## 2 Negligence Liability: the *Culpa* Rule

The *culpa* rule is one of the fundamental principles in Icelandic tort law. Under this rule, a person can be held liable for causing harm either intentionally or negligently. The criterion of negligence is the traditional standard of care expected of a reasonable man (a *bonus pater familias*). The application of the *culpa* rule corresponds in broad outline to principles of negligence in the common law jurisdictions and in many other countries.

In Iceland, as in many other parts of the world, courts have established a general standard of care which they apply to a variety of specific conditions. They may set higher demands for the standard of care in business operations, for example, than for private activities. Examples of areas in which the courts may raise the standard of care include work-related injuries, damage caused by permanent fixtures and fittings of buildings or other structures and damage caused by dangerous substances. The judicial assessment of culpability is more stringent in these and several other areas.

In some cases courts adopt an even more stringent position in actions against the tortfeasor's employer, applying standards of care that would seem to go beyond the limits of the *bonus pater familias* standard. This has happened in several countries. If the standard of care is raised inordinately, or the normal rules of proof are relaxed excessively, the legal responsibility of the liable party approaches liability without fault (hereinafter named *strict liability*).

A *child* can be liable in tort according to the *culpa* rule. In Icelandic law, the capacity for tort liability is not limited to a particular age. There are no general statutory rules on the non-contractual liability of children. The courts assess in each case whether the tortfeasor behaved differently from the way children of the same age normally behave in comparable circumstances. The youngest child on whom tort liability has been imposed by the Supreme Court was ten years old at the time the damage was caused. It is clear that tort liability would be imposed upon children younger than ten if other conditions for establishing liability were met, but one cannot say precisely where the courts would set the lower age limits. In the light of several cases on the contributory negligence of children who have been injured, it seems likely that children under the age of six would not normally be held liable in tort for their actions.

Mental disabilities of various types, or an abnormal mental condition, may render a tortfeasor incapable of understanding the nature of his behaviour or its consequences. According to the *culpa* rule, the tortfeasor is not liable if his mental deficiency is so serious that he was completely incapable of controlling his actions at the time when he caused the damage.

Although an insane person must be acquitted under the *culpa* rule, he could bear strict liability according to a special rule in *Jónsbók*, an Icelandic law code

dating from 1281. This rule is still regarded as valid, and the Supreme Court specifically referred to it in a 1972 judgment. The apparent justification for this ancient rule is that it is more reasonable that the risk of tortious acts caused by an insane person should be borne by him than by those who sustain the damage.

Applications of the *culpa* rule are not confined to the law of torts, but also include liability in *contractual relations*.

The general *culpa* rule applies not only to *physical damage to persons or tangible property*, but also to purely *economic loss*, e.g. illegal strikes, unfair competition, etc.

### 3 Vicarious Liability

An employer is liable for damage caused by tortious acts or omissions of his employees in the course of their employment. In Iceland the rule on vicarious liability is applied in very much the same way as in the other Nordic countries, in common law jurisdictions, France, etc.

As mentioned above, the courts generally apply a high standard of care to business operations, e.g. when an employee is injured at work.

It has also been mentioned that under special circumstances the courts may go further and apply such a high standard of care as to appear to overstep the normal limits of the *culpa* rule. The main examples have been in accident cases in which an employer is sued on the basis of his employee's negligence. In a few such cases standards of proof have been considerably relaxed so far as the employer is concerned. Such examples are well known in many countries; they represent a "grey area" between ordinary negligence liability and pure strict liability.

Opinions are divided on the desirability of such judicial expansions of culpability. The general view is based on the familiar rationale that it is more reasonable to place liability on the employer rather than to allow the injured party to bear his own loss, since the employer can often pass the cost of accidents on to his customers.

There are no clear-cut instances where the Icelandic Supreme Court has found a person liable for the torts of an *independent contractor* except under explicit statutory provisions.

### 4 Strict Liability According to Case Law

Icelandic courts have very rarely imposed strict liability without direct statutory authority. There have been three Supreme Court judgments, one from 1968 and two from 1970, that have invoked strict liability for work-related injuries caused by defects or malfunctions in equipment, without any showing of negligence on the part of the owner of the equipment, or his agents.

These three decisions have in common the fact that machinery or other *technical equipment* owned by the employer malfunctioned or had hidden defects. From these judgements, along with several others, one may conclude that, under Icelandic law, an employer can be strictly liable (i.e. regardless of fault) to his employee if the latter is injured as a result of defects in technical

equipment or machinery owned by the employer, including defects caused by normal wear and tear. However, the strict liability rule applies only if the loss is caused by some failure or hidden defect, and it is thus not applicable to losses caused by the normal use of machinery, etc.

It is difficult to draw general conclusions from the above-mentioned cases. In none of them, for example, is it stated whether the employer will be liable irrespective of fault if defective equipment causes damage to property owned by the employer's servant or a third party. Nor has there been any ruling on an employer's strict liability for defective equipment that causes personal injury to individuals other than his employees. Moreover, these cases do not say whether the employer would be held liable on a strict basis if the defective technical equipment were owned by another party (if, for example the employer has borrowed or hired the equipment). It is important to note that all three Supreme Court judgments, as well as other judgments in similar cases, relate to relatively dangerous technical equipment. One cannot say for sure, therefore, that strict liability for defective equipment applies to all tools (such as hammers and other hand tools not mechanically powered) or whether it is restricted to machinery generally attended by greater danger than other inanimate objects.

These conclusions accord with the tendency of Icelandic courts to apply strict liability in products liability cases. On the statutory rules on products liability and the liability of house owners see Sections 5.2 and 5.3 below.

In other cases, the Supreme Court has rejected demands for the imposition of strict liability without statutory authorization. Thus, there is no general rule of strict liability in Iceland covering extra-hazardous or abnormally dangerous activities.

Even though a survey of case law shows that strict liability has been applied without statutory authority only in a few exceptional cases, this does not necessarily mean that such wide-ranging liability will not be imposed in other kinds of special circumstances. When drawing conclusions from tort judgments, one must bear in mind that relatively few cases are brought before the courts which might be regarded as being special enough to warrant strict liability.

It is difficult to predict whether the courts will apply non-statutory strict liability to a greater extent than they have done up to now. Such liability is most likely to arise from activities which courts in many other countries have regarded as particularly hazardous, such as the handling of highly inflammable substances and radioactive materials (in Iceland there are no statutory rules on liability for nuclear damage), the keeping of wild animals and major foundation excavations and tunnelling.

## **5 Statutory Rules on Strict Liability**

Icelandic legislation contains a number of strict liability rules. Some of them are based on international conventions, e.g. the Aviation Act 1998 (*Lög um loftferdir nr. 60/1998*) and the statutory rules on civil liability for maritime oil pollution damage 1979. One Act has been designed in accordance with the standardized rules of the European Communities (see Section 5.2), while other

statutory liability rules have no direct models in other states. A short account of some of the main statutory provisions on strict liability follows below.

### **5.1 *Liability for Traffic Accidents***

A special strict liability rule is laid down in the Road Traffic Act 1987 (RTA) (Umferðarlög nr. 50/1987), which states that the registered owner of a motor vehicle is liable for injury to persons or damage to property resulting from the use of the vehicle even though the injury or damage can be attributed neither to failure or defects of the vehicle nor to the driver's negligence. In other words, there is strict liability for damage caused by motor vehicles.

The liability rule covers motorcars, motorcycles, tractors and all-terrain vehicles. For the sake of simplicity, only damage caused by motor cars will be specifically mentioned here, but what is said applies also to the other classes of vehicles listed above.

The special strict liability rule in the RTA does not, however, apply to all damage caused by the use of motor cars. General tort rules, not strict liability, apply to damage to the cars themselves and other losses sustained by owners or drivers involved in a collision of two or more motor cars. However, a special accident insurance provision was adopted in 1987 to improve the legal position of owners and drivers. This insurance program grants owners and drivers the same right to compensation for injury as they would enjoy under the RTA's strict liability rule. On the other hand, this insurance does not cover harm to objects that are damaged or lost in transit.

In Iceland, as in many other countries, the rules on strict liability for road accidents would have limited value for the protection of the injured party unless they also provided for compulsory liability insurance. If liability is established under the RTA, the injured party has a direct claim against the liability insurer. The injured party can demand compensation from the insurer even when the tortfeasor has forfeited his rights under the insurance contract, e.g. by causing the injury while under the influence of alcohol, or by non-payment of the premium.

### **5.2 *Products Liability***

EU member states have co-ordinated legislation on products liability, based on the Council Directive of 25 July 1985 concerning liability for defective products (85/374/EEC; Official Journal of the European Communities No. L 210/29). Although Iceland is not a member of the EU, its Products Liability Act (PLA), introduced in 1991 (Lög um skadsemisábyrgd nr. 25/1991), is basically in line with this directive. The content and presentation of the PLA are for the most part the same as in the Danish Products Liability Act of 1989.

Before the PLA was introduced, Iceland had no general statutory provisions on liability for defective products. To be sure, individual provisions in various statutes could in some cases apply to damage traceable to defective products, e.g. the civil liability provisions in the Road Traffic Act (1987) and the Aviation Act (1998). In any case, the courts had placed far-reaching liability on producers and vendors for damage resulting from defective products.

The PLA covers liability of producers and distributors for damage caused by a defect in a product which they have produced or distributed. Under the Act, damages are to be paid for personal injury and death. The Act also covers compensation for damage to, or destruction of, any item of property other than the defective product itself, provided that such items are ordinarily intended for private use or consumption, and were used by the injured party mainly for his own private consumption.

The PLA does not affect any rights which an injured person may have under “judge-made” rules of liability whether contractual or non-contractual, or under tort rules laid down in other Acts. This provision on the scope of the Act is in accordance with the Council Directive, Art. 13. In the event of damage covered by the PLA, the injured party may therefore choose whether to base his claim on the Act or on other Icelandic tort rules, consisting mainly of unwritten rules established by the courts before the PLA came into force. There is one exception to this: under the PLA, the rules of prescription of the Act also apply when the injured party bases his claim on tort rules other than those of the PLA. However, this Act gives the injured party such a strong legal position that other tort rules will probably not be used much in practice.

At the same time, if damage has occurred to property which the injured party mainly uses in the course of his occupation, or if damage occurs of a type not covered by the PLA, the injured party has to rely on case law, except where individual statutory provisions outside the PLA apply.

There is no need to describe here those provisions of the PLA which are identical to those of the Council Directive. In what follows, therefore, only the provisions of the PLA which are different from the rules of the directive, along with provisions based on the directive’s optional rules, are traced.

As has been stated, the Council Directive covers the producer’s liability, as defined in Art. 3. The directive does not cover the party who distributes a product unless he conforms to the definition of a producer in Art. 3. However, the PLA covers not only the producer, but also others who distribute the product. Under the PLA, a distributor who is not considered to be a producer bears strict liability for a defective product, with respect to the injured party and intermediate distributors. This is in line with the Danish Products Liability Act (1989). If two or more parties are jointly liable, liability is attributed according to special rules, likewise based on the Danish Act.

Primary agricultural products and game (cf. Council Directive, Art. 2) are not excluded from the definition of a product in the PLA.

The development risk defence (cf. Council Directive, Art. 7 (e)) is retained in the PLA.

Under the PLA, liability is not restricted to a threshold of 500 ECU (cf. Council Directive, Art. 9).

According to the PLA, the prescription period contained in the directive (Art. 11) is interrupted by court proceedings or when the liable party accepts a settlement out of court.

The directive’s ban on provisions concerning exclusion of liability in Art. 12 is extended in the PLA to include not only the producer as defined in Art. 3 of the directive but also the distributor. It should be mentioned that the definition of a producer in the PLA differs from the corresponding definition in the directive

in that under the PLA, import into the Community is replaced by import into Iceland.

The PLA limits a producer's liability for damage resulting from a personal injury or death to 70 million ECU (cf. the directive, Art. 16).

### **5.3 Liability of House Owners**

The Multi-Owner Buildings Act of 1994 (Lög um fjöleignarhús nr. 26/1994) contains a special liability provision stating that the owner of a separate unit is liable towards the other owners of the building and those with a right to its use for damage to their property which results from a malfunction or defect in apparatus, pipes, conduits or lines pertaining to the owner's separate unit.

A "multi-owner building" is defined in the Act as any building which is divided into separate units, owned by more than one party, and communal property, which may be the property of all the owners or of only some of them.

The liability provision does not require fault to establish liability. The owner of a separate unit is liable even though the loss cannot be attributed to negligence, e.g. if a hidden flaw in a pipe belonging to the owner of a flat on the upper floor causes flooding on the lower floor. In such a case, the owner on the lower floor could sue the owner of the pipe for compensation for damage to both the property itself and the chattels inside it, e.g. furniture or stocks of goods.

The fact that the courts had tended to apply a more stringent form of liability to losses caused by defects in real estate or by construction activity carried out on it probably paved the way for the adoption of the strict liability rule in this Act. Mention should also be made of judgments that apply strict liability to work-related accidents which result from failures or defects in equipment (see Section 4).

The Act also contains provisions stating that strict liability may be applied to owners in the same way if the damage is caused by a malfunction or defect in the communally-owned part of the building.

Some points in the above-mentioned provisions are open to interpretation, but will not be discussed here.

### **5.4 Liability for Animals**

The Common Grazing Act 1986 (Lög um afréttamálefni, fjallskil o.fl. nr. 6/1986) provides that, if livestock enters grassland, home-fields, gardens or other fenced areas, and causes damage, the owner is liable to pay damages to the injured party.

This provision is generally understood to provide that the livestock owner should be liable regardless of whether or not these areas are fenced off. Intrusion into other types of land, however, is not subject to tort liability under the Act unless such areas are fenced.

It is not a condition of liability that any fault of the livestock owner or his employees shall have caused the damage. The liability imposed by the Act is strict. As to the livestock owner's liability in respect of grazing in other unfenced areas, general tort rules apply.

Icelandic law contains very few other provisions regarding strict liability for animals. Such provisions as do exist apply only in isolated cases and are of little consequence in practice. The main rule in Iceland, therefore, is that liability for damage caused by animals is subject to rules making fault a condition of liability.

## **6 Governmental Liability in Tort**

Icelandic law contains no general rule on state immunity nor is there a general rule on liability for damage resulting from the exercise of public authority. There are some special and unrelated liability provisions in statutes, but little can be deduced from them concerning state liability in cases not covered by statutes. On the other hand, it is clear from case law that state and local authorities and their institutions may be liable for damage resulting from the exercise of public authority, even though there is no direct statutory provision to this effect.

From judgments that have been issued, one can find little difference between the liability criteria applied to the state and to local authorities. Both are governed by the same general rules of civil liability, under which negligence is the primary basis for liability. In cases of liability arising from the exercise of public authority, the injured party does not need to distinguish between the organization's direct liability and the vicarious liability of the organization. The basis of liability is simply negligence, irrespective of whether the tortfeasor is an employee or the supreme representative of public authority in a particular sphere.

There are many instances in which the negligence of a public official has given rise to state liability. Judicial decisions suggest that the state is generally liable in the same way as private persons for damage which can be traced to negligence. A few judgments, including cases involving the negligence of public servants making safety inspections, may indicate, however, that the state is not liable in all cases for the actions of its employees under the principle of vicarious liability.

There are no examples of the Supreme Court having imposed liability without fault on the state without statutory authorization. It is likely, however, that liability would be imposed on the state, in certain circumstances, e.g. for damage caused by excusable error in law, or by such particularly hazardous activities as justifiable law-enforcement actions that may injure innocent citizens e.g. by police measures aimed at controlling a hostile crowd.

This section deals only with the state as tortfeasor. The TDA, on the other hand, contains a rule on the special status of the state as an injured party if damage occurs to interests which the state does not normally insure and for which it is therefore a self-insurer (cf. Section 12 below).

## **7 Multiple Tortfeasors**

Under the basic non-statutory tort rules, the general principle is that, when more than one party is liable for the same loss, all are jointly liable. There are very few exceptions to this rule of joint liability, which the TDA does not alter. On

the other hand, the TDA contains the following innovation concerning the contribution between the tortfeasors themselves: Contribution among two or more parties jointly liable shall be made on the basis of what is found reasonable in view of the nature of their liability and other circumstances.

According to this provision, liability shall ultimately be distributed between the liable parties according to what is reasonable. In other words, certain factors in addition to the degree of negligence will be taken into account when one liable party seeks contribution from another. For example, when one party is liable according to the *culpa* rule, while the other or others are liable without fault, it is not always fair that the latter should have a full right of contribution against the negligent party. In such cases, the courts may examine the underlying basis of liability. The words “other circumstances” grant scope, i.a., for the consideration of arguments of loss distribution and social policy when the apportionment of liability is determined.

The above applies when either none (neither) or all (both) of the liable parties are covered by liability insurance. The Act contains special rules on contribution among liable parties when one or more, but not all, are covered by liability insurance. Under these rules, the loss is generally borne by the liability insurer and not by the party or parties who were not covered by liability insurance. There are some exceptions to this, e.g. if the uninsured party caused the damage on purpose or through gross negligence.

If the state, a local authority or another public institution which ordinarily is a self-insurer is one of the liable parties, it shall be regarded under the Act as if it were covered by liability insurance. In the apportionment of liability between parties who are not covered by liability insurance, liability may therefore be applied ultimately to the state.

Individual statutes, e.g. the Maritime Code 1985 (Siglingalög nr. 34/1985), include special rules on contribution among tortfeasors. The rules of the Tort Damages Act described above do not invalidate such special rules.

## 8 The Conduct of the Injured Party

It is a general rule in Icelandic tort law that the plaintiff’s claim will be wholly or partially reduced if he himself (or anyone for whom he is responsible) has negligently contributed to the occurrence of the damage. The rule applies when the injured party is an accessory to the event leading to the damage, and also when he neglects to take measures to avert or mitigate harmful consequences of the event.

This general rule rests on case law, but it is also incorporated in certain statutes, for instance the Maritime Code 1985 and the PLA. As mentioned above, the rule is a general one, i.e. it applies regardless of the tort rule on which the injured party bases his claim. A negligent plaintiff basing his claim on a statutory tort rule - for instance the strict products liability rules - will face a reduction on account of his own fault in the same way as a plaintiff, guilty of negligence, who bases his cause of action on a rule of case law such as the *culpa* rule.

There are no exceptions to this rule about the injured party's own behaviour, except those provided for in statutes. Such instances are very few in number. The most important one is the rule in the Road Traffic Act 1987 which states that damages for personal injury or death resulting from the use of a motor vehicle may only be reduced or disallowed if the injured party has, intentionally or through gross negligence, contributed to the accident. A rule in the Aviation Act 1998 says that there shall be no liability for injury to persons or for damage to property not aboard the aircraft and outside the area of an approved aerodrome, if the plaintiff caused the injury or damage by a wilful act or through gross negligence.

As will be seen from the foregoing, the principle of reduction of damages for "comparative negligence" is the main rule in Icelandic tort law, but the "contributory negligence" defence as a complete bar to recovery has not been allowed by Icelandic courts.

The TDA contains special provisions for modifying the general rules on comparative negligence if its effects would be unduly harsh for the plaintiff, or where unusual circumstances make it equitable to disregard the injured party's negligent conduct, in whole or in part. This adjustment of damages under terms of reasonableness is the same, in substance, as the rule on modification discussed in the next Section. Among other things, it enables the courts to take into account the financial situation of the parties and the existence of private insurance, with the consequence that damages are not reduced at all, or at least not as much, as would have been the case if merely the degree of fault had been considered.

The defendant may also invoke the defence of *voluntary assumption of risk*. Voluntary assumption of risk is a ground for the dismissal of an action in tort, not merely a ground for reduction of damages. On several occasions, the courts have used this doctrine to reject a passenger's tort claim against the driver of a motor vehicle whom the passenger knew to be intoxicated.

There are no clear examples in other areas where the courts have applied the rule on voluntary assumption of risk, but the rule could also apply where a participant in a sport is injured as a result of negligence on the part of another participant.

It seems fair to say that the distinction between the injured party's own fault and voluntary assumption of risk is not so sharply defined in Icelandic law as it is, for example, in English and US law.

## **9 Statutory Provisions on Modification of Liability on Grounds of Reasonableness**

The trend during the last few decades has been to strengthen tort rules to meet social demands to protect those who sustain loss, particularly in cases of personal injury and property damage. These demands have not diminished even though new and effective compensation remedies have been adopted outside the field of tort law. At the same time as demands have risen for more extensive or stricter rules on liability, more attention has also been given to the other side of the matter, i.e. the degree of legal protection of the tortfeasor or others who are

liable in tort. It has been pointed out that in various cases it may be unreasonable for the tortfeasor to bear unconditionally full liability for damage which he has caused through negligence.

Obviously, changes to the tort rules cannot achieve opposing goals at the same time, i.e. both expand the right to tort damages on the one hand and reduce tort liability on the other. Nevertheless, other sources of compensation may grant the injured party satisfactory remedies without imposing financial expense on the tortfeasor. In these cases, it is of no financial significance to the injured party whether he has a claim in tort or not. Alternative remedies do not always solve the problem, however, since damage is often of such a nature that the injured party has no means of obtaining compensation other than by bringing a claim against the party who is liable in tort. In addition it frequently happens that the injured party is compensated for only part of his loss through other remedies. Therefore, it is felt necessary to keep a way open for the judge to be able, in exceptional cases, to reduce the burden of liability of the liable party, e.g. when a person of limited means causes major damage as a result of minor negligence. In the past few decades, rules for modifying unreasonably heavy tort damages have been incorporated in the statutes of all the Nordic countries.

The TDA contains the following general modification rule: Damages may be reduced or liability may lapse where liability would involve an unreasonable burden on the tortfeasor or where very special circumstances otherwise make such modification reasonable. When assessment is made of whether there is reason to apply this rule, due regard shall be paid to the extent of the loss, the nature of the liability, the circumstances of the tortfeasor, the interests of the injured party, existing private insurance of the parties involved and other factors. Among other things, the modification rule gives the judge the freedom to consider arguments of loss distribution and social policy when he decides whether it is to be applied. It is left to the discretion of the judge whether, and if so, how to apply the rule.

This modification rule is of a general nature. It applies to contractual and non-contractual liability arising from personal injury or death, physical damage to property and purely economic loss. As regards the scope of the rule, it makes no difference whether liability is based on case law or statutory law. The rule covers liability whether it is based on fault or on strict liability.

Special modification rules apply to the liability of an employee who causes damage in the course of his work in the service of his employer (see the next Section).

It should be repeated that the general modification rule will be applied only in exceptional cases where strong reasons of social policy can be properly invoked.

The TDA also authorizes a corresponding modification when the injured party has contributed to causing the damage. Under this rule, courts may ignore, in whole or in part, the fact that the injured party was to some extent responsible for the damage he sustained (see Section 8).

At the time of writing this, the TDA has been in force for only a few years, and the rules of modification have not yet been invoked. It is still unclear to what extent the courts will make use of them.

## 10 Employee's Liability

The TDA contains special rules which modify the liability of an employee who causes damage (whether to a third party or to his employer) in the course of employment. These rules are based on the familiar principle that an employer can often spread the cost of accidents among his customers, and that consequently employers should ultimately bear liability for damage caused by employees. In practice, this was also the case before the TDA came into force. Normally, the injured party directed his tort claim to the employer, and made no claim against the employee. The employer thus carried the burden of liability, and it was only in exceptional cases that he sought an indemnity from an employee.

Under the new rules in the TDA, the right of recourse of the employer or his liability insurer against the employee exists only to the extent it is deemed equitable in light of the negligence exercised, the employee's position and other circumstances. The same limits apply to an employer's claim against an employee for damaging tools or goods owned by the employer, or for other damage to the employer.

If, nevertheless, the injured party should make a direct claim against the employee, the courts may reduce or suspend liability, in the light of arguments for loss distribution and social policy, i.e. according to conditions similar to those applying under the modification rule discussed in Section 9 above.

## 11 Assessment of Damages for Personal Injury or Death

The principles of Icelandic law for assessing compensation for property damage (including consequential loss) or purely economic loss, i.e. loss which cannot be traced to physical harm to persons or property, do not differ from those which apply in many foreign legal systems.

The general rule is that full compensation is to be paid for pecuniary loss. The aggrieved party is to be put in the same financial position, as far as possible, as he would have occupied in the absence of the injurious event. Damages are not paid for non-pecuniary loss, in the absence of statutory provisions to this effect. The principal statutory authorization for the award of damages for non-pecuniary loss is the TDA. Authorizations also exist in several other statutes, e.g. the Copyright Act 1972 (*Höfundalög nr. 73/1972*) and the Sexual Equality Act 1991 (*Lög um jafna stöðu og jafnan rétt kvenna og karla nr. 28/1991*).

Icelandic rules for assessment of damages for personal injury or death differ in certain respects from those current in most other countries. These rules, as laid down in the TDA, concern both pecuniary and non-pecuniary loss. The Act is based on the general principle that the liable party should pay damages for the entire pecuniary loss resulting from an accident. On the other hand, under the new law, these payments are largely standardized.

Before the TDA came into force, damages for personal injury or death were assessed by the courts in each individual case.

### ***11.1 Damages for Temporary Loss of Earnings, Medical Expenses, etc.***

Corresponding to practices in other countries, the TDA measures damages for loss of earnings from the time an injury occurs to the time an injured person can resume work, or until such time as no further improvement in his condition can be expected. The law seeks to establish how much income the injured party actually lost while he was unable to work, based on available evidence. Benefits which the injured party receives from social security, private insurance and other third parties, e.g. his employer, are deducted from gross lost earnings.

In addition, the liable party must pay medical expenses and other pecuniary losses resulting from the injury.

### ***11.2 Damages for Permanent Loss of Earning Capacity***

The TDA standardizes to some extent damages for the permanent loss, or reduction, of the injured person's capacity to earn an income from work. The provisions of the TDA in this area apply both to persons who had income from work prior to the accident, which can be used as a basis for the assessment of damages for loss of earning capacity in the future, and injured persons who have not yet established themselves in paid work. This latter group consists mainly of children, spouses engaged in housework without direct financial income and young people involved in studies prior to the accident.

Damages for permanent loss, or reduction, of earning capacity are to be determined in the form of a lump sum, and not periodical payments. The Act specifies that the amount of damages in any given instance is to be determined by three main factors: (1) The degree of incapacity, expressed as a percentage, (2) the injured person's income and (3) the injured person's age.

1. *Permanent reduction of capacity to earn an income from work.* Article 5 of the TDA states: "An injured person shall be entitled to damages for loss of earning capacity if, after his general condition has stabilized, his injuries have resulted in a permanent reduction of his capacity to earn an income from work." Under this rule, in order to qualify for damages, the injured person must be able to demonstrate that his earning capacity has been reduced as a consequence of an accident or illness for which the tortfeasor is liable.

According to this rule, a person who has suffered permanent injury does not have the right to damages if the injury has not reduced his capacity to earn an income from work. He may, on the other hand, qualify for damages for losses of other types, pecuniary or non-pecuniary, e.g. medical expenses or loss of amenity.

In assessing loss of earning capacity under the TDA, due regard shall be paid to the injured person's earning prospects in potential lines of work that might reasonably be expected of him. His mental and physical abilities, his working skills, education and age are among the factors involved in assessing the reasonableness of this requirement. From this it is clear that the assessment of

permanent loss of earning capacity involves both medical and economic factors. The reduction is to be rated in terms of a percentage (the degree of incapacity).

2. *Income.* Damages awarded to an injured person are to be calculated on the basis of his annual income, this term being defined in detail in the TDA.

The Act states that in unusual circumstances, e.g. when a change in income or employment has occurred before the accident, annual income is to be assessed specially. In particular, a special assessment must be made if the injured party was unemployed before the accident, was employed on a part-time basis or was self-employed with highly variable income. Annual income shall not be fixed at more than ISK 5,112,000,<sup>1</sup> even when the injured party actually had a higher income prior to the accident. This figure is then revised at any given time according to price-level changes.

The Act contains a special provision to the effect that annual income is not to be assessed below a particular level. This provision is applied in cases where the injured person had not established himself in paid work prior to his injury.

3. *Age.* As is stated above, damages for permanent loss or reduction of earning ability are to be assessed with reference to the injured person's *degree of incapacity*, his *annual income* and a coefficient found in a special table included in the Act reflecting the *age* of the injured person at the time from which his permanent loss of reduction of earning capacity is reckoned. The coefficient ranges between 11.438 for a child in the first year of life to 18.476 for a person aged 18. Thereafter, the coefficient is reduced for each year of the injured person's age, reaching 0.667 for a person aged 74. A person who has turned 75 at the time from which permanent loss of earning capacity is reckoned may have the right to damages if it can be demonstrated that he was in paid employment at the time the loss occurred.

The injured person's age is also of significance in determining the minimum wages to be taken into account under the Act.

### **11.3 Damages Following Death**

Under the TDA, damages, in addition to funeral expenses, are to be paid for the loss of a breadwinner. Those who have the right to claim damages are the spouse, cohabiting partner and children under the age of 18 whom the deceased had a statutory duty to support. Damages payable to all these parties are standardized. Others may also have a right to claim damages if they are able to demonstrate that the deceased would have supported them, in whole or in part, had he not died. Damages awarded to these latter dependants are not standardized, but are to be adjusted according to individual circumstances.

Fixed damages payable to a spouse or cohabiting partner for the loss of a breadwinner are set at 30% of the damages which the deceased would have been entitled to for total (100%) incapacity, under the rules described in Section 11.2. However, damages cannot be less than ISK 3,279,500 unless exceptional circumstances apply.

Fixed damages payable to a surviving child whom the deceased had a statutory obligation to support are equivalent to the total sum of the allowance to

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<sup>1</sup> All fixed sums in the TDA are as of July 1999.

which the child is entitled under the Social Security Act, payable from the occurrence of the loss until the child attains the age of 18. If the deceased was the child's sole source of support, damages are raised by 100%.

Those who suffer the loss of a breadwinner do not generally have a right to claim damages for non-pecuniary loss resulting from his death. Nevertheless, under the TDA, a person who, intentionally or through gross negligence, causes the death of another person may be ordered to pay the spouse, children or parents of the deceased damages for non-pecuniary loss. The amount of damages awarded is assessed by the judge in each individual case.

#### ***11.4 Collateral Sources of Compensation***

Depending on the type of loss in question, third party compensation payments can have an effect on an injured party's tort claim.

As stated above, standardized damages include those aspects of the loss that are most difficult to assess in monetary terms, i.e. future loss as a result of incapacity for work, or the loss of a breadwinner. In such cases it is open to question whether these standardized amounts are sufficient compensation for the actual loss suffered by the injured party.

Under the TDA, the general rule is that personal injury compensation paid to the injured party by a third party, e.g. social security or a pension fund, is to be deducted from the plaintiff's claim for damages for *lost earning capacity* or the *loss of a breadwinner*. In other words, the plaintiff is generally not allowed to recover both the compensation from the third party and damages to which he would independently be entitled from the tortfeasor. There are exceptions to this general rule. Compensation from personal life-, health- and accident insurance taken out by the injured party himself and a part of pension funds' benefits are not to be deducted from the plaintiff's tort damages. These exceptions will not be dealt with in any further detail here.

The *temporary loss of past earnings* can generally be evaluated with considerable accuracy, and the Act stipulates that damages are to be based on an assessment of the loss sustained by each individual injured party.

Payments from third parties are deducted from tort damages for temporary loss of earnings. An injured person who receives benefits from a pension fund may nevertheless continue to receive part of them without their being deducted from his tort claim against the tortfeasor. Compensation from personal life-, health- and accident insurance taken out by the injured party himself and tort damages can be cumulated unless the insurance benefits cover the actual pecuniary loss of the plaintiff.

#### ***11.5 Non-Pecuniary Loss in Personal Injury Cases***

Under the TDA, a person who, intentionally or through gross negligence, causes personal injury may be ordered to pay damages for non-pecuniary loss, the damage amount being assessed by the judge in each individual case. Regarding damages for non-pecuniary loss in the event of the loss of a breadwinner, see the end of Section 11.3.

Otherwise, damages for non-pecuniary loss are standardized and take two forms: damages for pain and suffering, which compensate for temporary discomfort, and damages for loss of amenity, which cover the permanent consequences of an accident.

The injured party is to be awarded damages for *pain and suffering* for the period from the occurrence of the injury until such time as no further improvement in his condition can be expected. These amount to ISK 1,480 for each day during which the injured party is bedridden and ISK 800 for each day during which he is ill without being bedridden. In special circumstances, damages for pain and suffering may be paid even though the injured party is not ill. If damages amount to more than ISK 227,200, courts are able to modify these figures. All these figures are revised at any given time according to price-level changes.

Damages for *loss of amenity* (permanent non-pecuniary loss) are determined by special assessment. Under the Act, this assessment takes into account the nature and extent of injury and impairment, from a medical point of view, as well as the disadvantages and inconveniences suffered by the injured person in his daily life, such as permanent disfigurement. The assessment is based on disability tables (*cf.* Section 11.6) in which permanent physical, and, where appropriate, mental consequences of the accident are expressed in terms of percentages (degree of disability).

The Act contains exact provisions regarding the amount of damages for loss of amenity. This varies according to the age of the injured person and the degree of disability. The Act includes a table setting out the amount of damages for total (100%) disability. Damages for loss of amenity payable to an injured person aged 49 or younger on the date of the loss are set at ISK 4,544,000, this figure being reduced progressively with increasing age thereafter. An injured person who is 74 or older on the date of occurrence of the loss is entitled to ISK 3,408,000. Where the degree of disability is less than 100%, the amount is reduced proportionally. All figures are revised at any given time according to price-level changes.

Under special circumstances, damages may be awarded up to 50% higher than those set out in the table.

### ***11.6 The Disability and Loss of Earning Capacity Board***

It should be clear from the above that the assessment of disability and incapacity will greatly influence the quantum of damages awarded for permanent injury resulting from an accident. The degree of disability and the injured person's age are crucial in determining the amount of damages awarded for loss of amenity, and the degree of incapacity has a great effect on the quantum of damages awarded for permanent incapacity.

The TDA contains provisions for a special board whose functions include the determination of degrees of disability and incapacity. It states: "When an expert opinion has been obtained as to the degree of the injured person's incapacity and/or disability, both the injured person and the party against whom the claim for damages is directed may refer it to the Disability and Loss of Earning Capacity Board. The board may be requested to assess the degree of incapacity and/or

disability where no expert opinion has been obtained providing both parties to the case are involved in making the request.”

According to this, the role of the Disability and Loss of Earning Capacity Board is, on the one hand, to review assessments by experts of incapacity or disability, and, on the other, to assess these matters where no other assessment has been referred to it, providing that the parties to the case agree on seeking such an assessment.

In addition, the Disability and Loss of Earning Capacity Board is charged with compiling disability tables to reflect the permanent effects of personal injury on the assessment of damages for loss of amenity (*cf.* Section 11.5). In these tables, the main types of loss of amenity are expressed in percentages. These tables are often inadequate when it comes to quantifying loss of amenity as a percentage in a particular case. It then becomes necessary to obtain an individual assessment in which the main consideration are the nature and extent of personal injury in medical terms. As has been stated, estimates of loss of amenity may be referred to the Disability and Loss of Earning Capacity Board.

The assessment of permanent loss or reduction of earning capacity, on the other hand, is very different from that of loss of amenity. It aims to evaluate the financial consequences of personal injury, i.e. the permanent reduction of the injured person’s ability to earn income from work in the future (*cf.* Section 11.2). As is stated above, assessment in financial terms of the loss or reduction of earning capacity is based mainly on financial and social factors, such as the injured person’s previous education and employment, his skills, the scope for rehabilitation, the injured person’s age, place of residence and the employment situation, though of course the physical and, as appropriate, mental, consequences of the injury must also be taken into consideration. Thus, medical expertise is not sufficient to assess permanent loss or reduction of earning capacity in financial terms, and the TDA provides for the Disability and Loss of Earning Capacity Board being composed of a lawyer as well as medical experts.

Disputes concerning the assessment of loss or reduction of earning capacity and the loss of amenity are resolved by the courts. This applies equally to assessments by the Disability and Loss of Earning Capacity Board and those made by other experts, including those appointed by a court.

### ***11.7 Miscellaneous Provisions on Damages for Personal Injury or Death***

The TDA contains limited provisions for the review of damages assessed for loss of amenity or loss of earning capacity when unforeseen changes take place in the injured person’s condition. The Act also contains provisions on the effect of price level changes on the amount of damages, provisions on interest on damages, and special rules on the transfer of claims, e.g. through assignment or inheritance.

Under tax legislation income tax is payable on damages for temporary loss of earnings, but not on damages for non-pecuniary loss, permanent incapacity for work or the loss of a breadwinner.

## **12 The Interaction of Tort Law and Other Compensation Systems**

Section 11.4 above shows how tort claims are affected by full or partial compensation payments from third parties. This section examines new statutory provisions on the denial of tort liability and on the limits of the third party's right of recourse, in cases where the injured party has access to remedies outside the field of tort law.

One function of tort law is to provide people with financial compensation for losses which they suffer. The prevalent view, both in the Nordic countries and some other countries, is that various other remedies, in particular private insurance and social security, fulfil this function better, in many ways, than traditional tort law. This applies not least in the case of personal injury. Nonetheless, the social value of tort law is felt to be so great that it has generally not been considered possible to abolish it completely and adopt another compensatory system or systems.

The Insurance Contracts Acts (ICA), which were introduced in the Nordic countries a few decades ago, contained provisions that limited the insurer's right of subrogation against liable parties. This was an important step in the direction of having private insurance take over the compensatory function of tort law. By enacting the ICA, the legislatures in the five Nordic states recognized that there were often good reasons not to retain the plaintiff's right to tort recovery or the insurer's right of subrogation when damages are paid by private insurance. The Nordic countries have taken another step in this direction by abolishing the social security system's right of recourse against the party liable for a loss which had been partly or fully compensated by the system.

The growth of private insurance and social security has greatly reduced the importance of tort law, in particular as regards personal injury. In Iceland, the right of recourse is of marginal significance to the financial performance of private insurers and the social security system. The right to bring a tort claim against the tortfeasor is generally of no significance to an injured party who has easy access to full compensation for his loss from an insurer.

The TDA restricts the injured party's tort remedy and the third party's right of recourse far more than used to be the case. The main policy in the Act is to limit the injured party's tort claim and the third party's right of recourse to the extent that losses are compensated by private or social insurance. There are some exceptions to this rule, however, in recognition of certain admonitory or deterrent effects of tort rules. The right to a remedy in tort or a private insurer's right of recourse is still available if the liable party acted intentionally or with gross negligence, or when the loss occurs during the performance of public acts or services, or in the course of business or similar private activities. The right to tort recovery and the private insurer's right of recourse also remain if the defendant's liability is based on provisions in certain statutes, e.g. the Road Traffic Act or the Maritime Code.

Another important innovation in the TDA is to limit the right to tort recovery by the state, local authorities or other public authorities that ordinarily self-insure, similar to the limits facing those who are privately insured. The main rule is that the right to tort recovery does not exist in the case of loss suffered by a public body which spreads its accident cost without insurance, i.e. which operates as a self-insurer. In other words: the aggrieved self-insurer does not

enjoy a better right than if there had been an insurance contract. This rule rests on the principle that aggrieved parties should be in the same legal position whether the damage occurs to insured interests or to uninsured interests of large enterprises that consider it economically preferable to operate as self-insurers.

The rules of the Tort Damages Act mentioned in this Section are summarised below.

### **Lapse of Tort Liability and Exemption From Third Party's Right of Recourse According to the Tort Damage Act 1993**

#### **1. Loss covered by life assurance, accident or sickness insurance, social security or pension funds.**

*The insurance company, pension fund or social security system has no right of recourse against the liable party.*

#### **2. Loss covered by property insurance or lost-profits insurance**

Neither the injured party nor the insurance company is able to claim damages from the liable party.

Exceptions: A tort claim and right of recourse exist if

- (a) the damage was caused intentionally or through gross negligence, or
- (b) the loss was caused during the performance of public acts or services, or in the course of private business activities or similar activities (an exception applies to the liability of an employee), or
- (c) the loss is covered by the liability rules of the Road Traffic Act, the Aviation Act, the Maritime Code, the Contracts of Carriage by Road Act or the International Convention on Civil Liability for Oil Pollution Damage.

#### **3. Loss to interests not covered by insurance**

In cases where the injured party is the state, a local authority or another public institution which ordinarily is a self-insurer, it has no tort claim against the liable party.

Exceptions as in 2 (a)-(c) above.

#### **4. Loss covered by liability insurance**

Neither the injured party nor the insurance company has a tort claim against an employee who causes damage covered by his employer's liability insurance, unless he causes it intentionally or through gross negligence. The same applies to an employee who causes damage while in the service of a *public body* which operates as a self-insurer.

If one or more parties who are jointly liable have a liability insurance policy which covers the damage, liability between them is attributed according to special rules, under which a tortfeasor covered by liability insurance (or his

insurer) is unable to claim any part of the damages from a tortfeasor who is not insured.

**5. Loss covered by indemnity insurance<sup>2</sup> other than property insurance, lost-profits insurance and liability insurance**

The injured party and the insurance company have a tort claim against the liable party.

It should be noted that this rule does not apply to the most important categories of indemnity insurance (i.e. property insurance, lost-profits insurance and liability insurance) except in the cases mentioned in 2 (a)-(c) above.

**Abbreviations**

ICA: Insurance Contracts Act No. 20, 1954

PLA: Products Liability Act No. 25, 1991

RTA: Road Traffic Act No. 50, 1987

TDA: Tort Damages Act No. 50, 1993.

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<sup>2</sup> Indemnity Insurance can be defined as insurance in which the insurer is obliged to pay indemnity only when the insured party has suffered a loss which can be valued in terms of money (ICA, Section 35), and where the compensation payable by the insurer is determined by the amount which is needed to make up for the loss (ICA, Section 39 (1)).