

# Personal Injury Compensation in Sweden Today

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## 1 Introduction

The general rules on liability and compensation in Sweden is to be found in The Tort Liability Act (Skadeståndslagen, Law No 1972:207, amended 1975:404 and 1995:1190).<sup>1</sup> This law is based on the principle of liability for negligence, the *culpa rule*.<sup>2</sup> Historically this has been the predominant rule in Swedish tort law. However, already under the 19th century principles of strict liability were developed in the legislation, beside the culpa rule. There are now some important laws based on strict liability, most prominent perhaps The Traffic Damage Act (Law No 1975:1410).<sup>3</sup>

During the latest decades voluntary agreements have been arranged on compensation to the victim without regard to fault. Among these collectively bargained agreements may be mentioned the Security Insurance for Occupational Injuries as well as the Pharmaceutical Insurance. The Patient Insurance was from the beginning also a voluntary agreement but is now part of the legislation.

A characteristic for all these legal or agreed compensation rules is that they generally guarantee the victim full compensation, according to the principles of the tort law. Indemnities are paid in accordance with the general principles of this law, i.e. the guiding rules in the Tort Liability Act, chapter 5. When it comes

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<sup>1</sup> The reform in 1975 was based on a report by the Damages Commission, SOU 1973:51 Skadestånd V, see Government Bill 1975:12.

<sup>2</sup> See Jan Hellner: *The Swedish alternative in an International Perspective*, in Oldertz/Tidefelt (ed.) *Compensation for Personal Injury in Sweden and other Countries*, Stockholm 1988, p. 17. Also published in *The American Journal of Comparative Law* vol. XXXIV 1984, p. 613.

<sup>3</sup> The development and principles of the different types of compensation schemes known as “the Swedish model” see articles by Jan Hellner, Carl Oldertz and Erland Strömbäck in Oldertz/Tidefelt, op cit., p. 17, 51 resp. 41.

to personal injury - the subject of this paper - this means that the victim is fully compensated for the economic and non-financial consequences of the injury.

Another characteristic of the Swedish system is that claims-settlements are frequently reached out of court. Most personal injury claims are settled voluntarily according to opinions given by advisory boards in the insurance field. The most important of these boards are the Traffic Accident Board and the Liability Insurance Personal Injury Board. It is no overstatement to say that especially these two boards are setting the standards of personal injury compensation in our country, leaving the Supreme Court to develop the legal practice in some more important key issues. The cases going to court are few, perhaps some hundreds a year. The general opinion is certainly that "no justified objections can be raised to this system of resolving and preventing conflicts".<sup>4</sup>

In today's society the indemnities mentioned are only one of many sources of compensation. Normally several of these sources are operational in the same case. The indemnity itself may in relative terms constitute a minor part of the total compensation. Payments from social insurance (including occupational injury insurance), group sickness insurance, sick-leave pay or benefits from private insurance etc. are in many cases assuming the major part of the financial responsibility.

The nature of indemnities based on tort law as supplementary compensation is becoming more and more clear with the continuous development of other sources of compensation. Sometimes there can be a tendency to over-compensate the victim. This has been apparent with the development of compensation systems, the benefits of which are not deducted from the tort indemnities. But overcompensation must be accepted to a large extent, at least when the injured person himself has arranged the insurance protection through his own foresight.

There exists several interlocking sources of compensation for personal injury today. In this situation, the question of how all the different benefits should be coordinated assumes ever increasing importance. What procedure should be adopted when a number of different sources of compensation become operative, each covering parts of or the whole injury? The problems in this area constituted an important element in the partial reform of the Tort Liability Act 1975 dealing with Assessment of Compensation (Law No 1975:404, amended 1995:1190). One important background to this reform was the necessity to formulate clearer rules for assessing indemnities to ensure that the victims are neither under- nor overcompensated.

It should be pointed out that in Sweden indemnities in most cases are wholly or partly paid out through liability insurance. Right to indemnity is therefore mostly also a question of compensation to be paid, not by individuals, but by an insurance system. This fact has in recent years had a strong influence on the legislation itself. Ordinary liability insurances are now widespread by virtue of various package solutions. It is estimated that only about 10 percent of the

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<sup>4</sup> The Commission on compensation for non-pecuniary damage in its Report SOU 1995:33 p. 37. The Commission is henceforth in this paper called "The Commission". - An instructive description of the Traffic Accident Board by its chairman Edmund Gabrielsson see *Juridisk Tidskrift* 1997-98 p.645.

population is lacking liability insurance. The traffic liability insurance is of course also widespread since the insurance is compulsory for the motorists. Injuries caused by uninsured vehicles are covered by joint liability carried by the traffic insurance companies.

In the following a summary is given of Swedish tort legislation and the other systems of compensation which may become operative in cases of personal injury. Thereafter the question is dealt with concerning the assessment of indemnities, with emphasis on the coordination of the indemnities and other benefits provided under Swedish law.

## **2 The Tort Rules**

### ***2.1 Tort Liability Act***

The core of the rules in the Tort Liability Act, above all the culpa rule, is in full accordance with earlier legislation and the traditional way in Sweden as well as in most other European countries to provide compensation for personal injury.<sup>5</sup> The culpa rule has been codified in the form in which it has been applied in recent decades. Anyone causing personal injury or damage to property, deliberately or by negligence, must pay compensation for the injury or damage. Under a rule in 3:1, employers can be held responsible for injury or damage caused by an employee in the scope of his employment through fault or negligence. Another rule refers to the liability of state or local government for injury or damage caused by error or neglect made by the authorities in the carrying out of activities for the execution of which the state or the local government is responsible, 3:2. There are some limitations in the liability under this rule.

Tort liability can be reduced in case of contributory negligence. The reduction is made according to what is considered reasonable with regard to the degree of negligence on each side and to the specific circumstances of the individual case. A rule in 6:1 is inspired by social considerations and provides that reduction of liability in case of personal injury can be made only when the victim himself contributed either wilfully, by gross negligence or drunken driving. In case of death, indemnities can also be adjusted where the deceased has wilfully contributed to his death, i.e. through suicide.

According to 6:2, indemnities can be adjusted if the payment of them places an unreasonable economic burden on the person liable.

### ***2.2 Special Legislation on Liability***

Special liability rules exist in some fields of risky activities. In general, these rules mean a more advanced liability in relation to the culpa rule. However, it is characteristic that the normal rules of assessment of indemnities in the Tort Liability Act also applies to these special areas. Under the Railway Traffic Act

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<sup>5</sup> See Hellner op. cit. supra n. 3 p. 19 and Bertil Bengtsson: *Skadeståndsrätt - några huvudlinjer*, Stockholm 1994 p. 15.

of 1985 the railway is liable on no-fault basis for personal injury. The Traffic Damage Act is also based on no-fault as concerns personal injury. The liability must be covered by a compulsory traffic insurance. A person who suffers injury as a result of a motor car accident has the right to compensation regardless of fault or negligence on the part of the owner or the driver of the car. The compensation can be reduced if the victim himself has contributed to the accident wilfully or by gross negligence or by drunken driving in combination with negligence, or in the case of fatal accident which the victim deliberately caused.

Special liability rules also apply to other sectors of transports. So is the case with the Maritime Law of 1994, Air Traffic Liability Law of 1922, Air Traffic Act of 1957, Electric Installations Act of 1902, Nuclear Liability Act of 1968, Environment Liability Act of 1986, Product Liability Act of 1992, and also Law on Supervision of Dogs and Cats of 1943. Of special interest for victims of crimes is the Law on indemnification for the victims of criminal offences of 1978.

### **3 Contractual Compensation in Certain Cases**

An outstanding feature of development in Sweden regarding compensation for personal injury is the compensation systems sometimes known under the concept of "The Swedish model".<sup>6</sup> They are more or less directly based on the norms of the Tort Liability Act as regards assessment of compensation. These systems are solving a lot of questions normally belonging to the legislative sphere. The systems have in many respects been found to be more flexible and expedient than settlement by the normal legal process. They were originally the following three:

- the Security Insurance for Labour Accidents,
- the Patient Insurance,
- the Pharmaceutical Insurance.

The construction of these types of insurances "has the characteristics of liability insurance intended to cover a liability in contract based on unilateral, generally applicable commitments by employers, the health care authorities and the pharmaceutical industry".<sup>7</sup>

The Security Insurance for Labour Accidents was the precursor in this field, the insurance being based on collective agreement and issued by a consortium of the largest insurance companies. It was originally intended to apply to certain categories of workers particularly exposed to the risk of severe injury, for instance dockers and miners. Today the insurance applies to practically all

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<sup>6</sup> See Carl Oldertz: *The Patient, Pharmaceutical and Security Insurances*, in Oldertz/Tidefelt, op cit., p.51, also published in *The American Journal of Comparative Law* vol. XXXIV 1986 p. 635, Carl Oldertz: *The Swedish Patient Insurance System - 8 Years of Experience*, in *The Medico-Legal Journal*, vol. 52 Part 1, 1984 p. 41. Bill W. Dufwa: *Flera skadeståndsskyldiga*, Stockholm 1993, nr 5129-5142, and *Svensk Juristtidning* 1979 p. 459.

<sup>7</sup> See Carl Oldertz, in Oldertz/Tidefelt, op. cit. p. 51.

employees, and the employers as well. The greater part of the insurance is administered by a special company managed by the labour market organisations, AMF Trygghetsförsäkring.

The original purpose of the Security Insurance was to ensure that victims of labour accidents shall receive compensation according to the norms of tort law without having to prove fault on the part of the employer or any other person. This means that in practice the injured is fully covered for his loss of income.<sup>8</sup> In addition he receives compensation for non-financial injury basically in accordance with the principles of the law of torts. He is thus compensated for pain and suffering, disfigurement or other permanent disadvantage, and special inconveniences. Certain modifications have been made, however, which is explained by the fact that the insurance conditions is a part of the collective agreement and that the parties can decide upon the compensation levels themselves.

Compensation from the Security Insurance is not paid in case the injured himself has caused the injury by gross negligence or where the injury was caused under the influence of alcohol or drugs.

A person protected by the Security Insurance can also take out collectively or individually a Security Insurance covering his leisure time. The ordinary tort rules are thus to a certain extent losing their importance also outside working hours.

Patient Insurance was until 1996 based on voluntary insurance arrangements, introduced with the purpose of providing compensation according to the principles of tort law, without any burden for the victim to prove culpa on the part of the medical staff in case of bodily injury in connection with medical and health care. The arrangements secured compensation to patients who have suffered injury directly connected with the medical treatment. Since 1996 the Patient Insurance is regulated in the Patient Damages Act (Law No 1996:799). The right to compensation is also in the Act based on strict liability.

The Pharmaceutical Insurance has its background in the fact that serious injuries can be unexpectedly and unforeseeably caused by known or unknown side-effects of pharmaceutical products. The relation to the Patient Insurance is very close. There are no reason why an injury caused by a drug should be compensated in a manner different from an injury caused by an operation.<sup>9</sup> The insurance, based on strict liability, is financed by the pharmaceutical industry and came into effect 1978. The compensation is in principle settled in accordance with the rules in the Tort Liability Act.

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8 In order to reduce the costs of the insurance there has recently been a limitation in the cover. It is now necessary to prove fault on the part of the employer or someone for which he is responsible to get compensation for loss of income. The limitation spoils much of the essence of the insurance.

9 Cf Oldertz op cit. p. 58.

## 4 Other Sources of Compensation

### 4.1 *Social Insurance: National Insurance*

Social insurance is compulsory and provides with basic protection in case of incapacity for work due to sickness or injury. The two important branches of social insurance are National Insurance and Occupational Injury Insurance.

National Insurance gives compensation irrespective of the cause of the injury and of the circumstances in which the injury has occurred. It comprises of health insurance, basic pension and supplementary pension. Benefits are financed chiefly out of public funds and employer contributions but also by contributions paid by the insured themselves.

The health insurance accounts for medical care, that is treatment in hospital, medicines etc. It covers all or nearly all costs incurred by the patient. It also provides for sickness insurance benefits compensating loss of income during the period of illness. The compensation for loss of income is however limited up to a certain ceiling and is also depending on the duration of the illness. The maximum income insured is for the present (1998) 273.000 SEK, that is 7,5 times the Basic Amount<sup>10</sup> 36.400 SEK. During the first period of the illness compensation to an employee is paid by the employer in form of the normal salary reduced with a certain percentage.

Benefits are paid as long as the working incapacity is reduced. Protection against loss of income due to more permanent incapacity is, however, provided by the Early Retirement Pension, that is a disability pension under the National Pension Scheme. Basic and supplementary retirement pension can be granted if the capacity of the insured is regarded as permanently reduced by at least 25 percent, on account of injury, sickness or any other reduction of his physical or mental performance. A person totally or almost totally disabled qualifies for a full pension. If the degree of disablement is lower he is compensated with only a certain part of full pension, roughly corresponding to this degree.

Working incapacity is not exactly graded in this system. It has not been deemed possible to peg compensation to an exact degree of disablement in a social insurance system with a very mixed clientele.

The effect of injury or sickness on a person's working capacity in each particular case is decisive if the incapacity is permanent. Thus, it is not the injury or the sickness *per se*, expressed by a certain medical degree of disablement, which entitles the insured to compensation. The "economic disablement concept" in the National Insurance is based on the insured person's medical status but also all other factors which has influence on his ability to make use of his residual capacity for work. Factors that might have such influence is education, earlier activities, age, housing conditions, possible rehabilitation etc. Future changes in working capacity, whether for the better or the worse, affect compensation. The possibility of reconsideration of the compensation is regarded as a natural part of the individual assessment of the disablement.

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<sup>10</sup> An index-tied unit, used for social insurance purposes: The present value of 4.000 SEK in the general price level of 1957.

Basic Early Retirement Pension is not graded according to income. It is a flat-rate benefit based on a certain percentage of the Basic Amount. On the other hand, benefits under the Supplementary Pension Scheme are graded according to the insured's earnings while fully capable for work, over a certain qualifying period. If he had not worked the full qualifying period, a presumed income is calculated for the missing period. A full basic pension together with supplementary pension provide compensation for 60-90 percent of the insured's income when fully fit for work. The highest degree of compensation is to be found in the lowest income bracket. In the higher brackets - up to an annual working income of about 270.000 SEK - the degree of compensation is slightly above 60 percent.

In the event of loss of breadwinner, the dependants are entitled to family pensions in the form of widow's pension and children's pension. As in the case of Early Retirement Pension, the method of calculation differs as regards the basic pension, which is a flat-rate benefit amounting to a certain percentage of the Basic Amount, and the Supplementary Pension which is based on the pension rights which the deceased had acquired through his work. A widow's right to pension has been thoroughly restricted during recent years, and in the long run this kind of benefits will be abolished. A child is entitled to a certain percentage of the early retirement pension for the deceased parent.

There is no right to recourse action in respect of benefits paid from the social insurance schemes. The social insurance carriers have no right of subrogation against a tortfeasor or liability insurance etc.

On the other hand, the victim who has right to compensation according to tort law must accept that the damages are reduced to full extent by the benefits from the social insurance. The practical result of this is in a tort case that liability for the injury is reduced by the amount paid out by the social insurance, and thus the insurance also works in favour of the party responsible.

#### **4.2 Social Insurance: Occupational Injury Insurance**

Persons suffering from industrial and other occupational injuries are entitled to compensation from the compulsory Occupational Injury Insurance (*Arbetskadeförsäkringen*), in force in its present form since 1976. Every employer contributes to this insurance on behalf of his employees. In addition to the typical accidents at work it also covers accidents on the way to or from work and occupational sickness.

The Occupational Injuries Insurance reinforces the basic protection through National Insurance in the case of occupational injuries or diseases. It provides a higher compensation level in the event of injury or disease leading to disablement or death. For minor injuries, however, the benefits are roughly the same. The insurance gives life-long annuities to an injured person whose capacity to work is permanently reduced by at least 1/15. The insurance is closely linked to the National Insurance regarding the concept of economic disablement.

The annuity together with benefits from National Insurance aims to compensate the insured his loss of income fully, under the general ceiling of 7,5

Basic Amounts which is the general maximum taken in account by the Social Insurance in Sweden.

Annuities can also under certain circumstances be paid to dependants in case of death resulting from occupational injury or sickness.

The collectively bargained Security Insurance for Occupational Injuries is to a large extent a complement to the Occupational Injury Insurance and has its special importance in compensating non-pecuniary damage, such as pain and suffering, permanent impairment to life as well as mutilation and something called “other inconveniences”. The Security Insurance also compensates loss of income over the general ceiling of 7,5 Basic Amounts in the social insurance.

### **4.3 Other Sources, Coordination (cf 6)**

An Early Retirement Pension from National Insurance is often payable together with an annuity from the Occupational Injury Insurance. Survivors’ benefits sometimes coincide, too. For these cases there are rules for coordination between the benefits, in order to avoid over-compensation. The benefits from the Occupational Injury Insurance is regarded as complement to benefits from the National Insurance, not influencing the amount of the basic protection from that insurance.

Earlier, the Occupational Injury Insurance was the only benefit an employee qualified for if he became disabled or died as a consequence of a work-related injury. Nowadays, the employee and his survivors are often also protected by different additional benefits, either directly paid by the employer or emanating from an insurance policy paid by the employer.

Sick-benefits paid by the employer is now the normal compensation for loss of earnings during the first 14 days of the period of acute illness. After that period the sick-benefits are paid by the National Insurance. In addition to the sick-benefits is often paid a complementary benefit from a collectively bargained group health insurance (AGS, *avtalsgruppsjukförsäkring*).

The scope of such benefits is limited since sick-benefits paid by employer or the health insurance provide as much as 80 percent of earnings up to the general ceiling of 7,5 basic amounts. The Government has indicated that there must be a “self-risk” in case of injury or sickness, not to be covered by benefits. That is to avoid over-use. The existing benefits payable by employers or insurance such as AGS have, as a rule, been adapted to these principles. In cases where compensation is paid under the ordinary rules of tort law and the special insurances attached to them, full compensation is, however, allowed.

If a disease or accident results in permanent disablement, there are also benefits to supplement the basic protection provided by the social insurance. Government and local authority employees might be entitled to sick pension to a level of about 65 percent of their income before the accident or illness. This pension level includes social insurance benefits from the National Insurance, e.g. early retirement pension.

White collar workers in the private sector can rely on disability pensions under the so called ITP-system, or corresponding systems. The employee is guaranteed a pension in relation to his earnings as fully fit for work. A full



pension amounts to about 65 percent of annual earnings up to a certain limit, subject to coordination with any social insurance benefit payable at the same time. There are no limit as to earnings taken in account, as in the National Insurance. Thus compensation is given also for loss of earnings over the general ceiling of 7,5 Basic Amounts.

Manual workers have protection through the AGS-insurance in the form of a monthly payment, fixed in advance. There are also agreements on complementary pension for workers (Avtalspension SAF-LO) giving compensation additional to the benefits from the social insurance. This pension compensates for loss of income even over the general ceiling of 7,5 Basic Amounts. Some measures of protection for survivors have also been achieved in the systems now mentioned, e g family pension according to the ITP-plans.

The employer was earlier considered to have a right of recourse action for any compensation in the form of sick-pay, pension etc. directly paid to an employee in a liability case. Because of the system for coordinating benefits in the Law of Torts, the so called "net-method", recourse action is not possible unless it was an agreed condition when paying out the benefit. In such a case it is necessary to coordinate according to the "gross-method". That means that there is room for a recourse action within the level of the total compensation. If compensation is granted for an injury for which the insured is entitled to damages, the insured is obliged to transfer his claim to the insurer or the employer.

The "net-method" regulated in 5:3 of the Law of Torts means that most of the collateral benefits paid out to a victim in case of an injury are coordinated with the damages. The benefits coordinated are:

- Compensation provided from the obligatory National Insurance (the Health Insurance and the Occupational Injury Insurance) or other similar compensation.
- Pension or other periodical compensation or sick benefit if it is paid by an employer or according to a collectively bargained insurance or another insurance for which the premium is paid by the employer.

A benefit from e g the Early Retirement Pension is fully deducted from the damages, and that means among other things that there are - in accordance with the basic principle in the Swedish social insurance system - no room for a recourse action. The benefits coordinated with the damages according to the "net-method" for this reason also favour the one who is responsible under the tort rules, since they reduce the damages he has to pay.

Benefits from private insurance are in most cases not coordinated with the damages, meaning that the injured person may collect benefits from an unlimited number of such policies.<sup>11</sup> Private insurance is considered to be the individuals "private business". It is thus possible for the victim to receive benefits from private sick-insurance, accident insurance or pension insurance without any influence on the damages. The amounts are mostly fixed in advance. And it is

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<sup>11</sup> The right to draw plural benefits from insurance and damages is not forthcoming if the insurer has reserved the right of recourse or can claim repayment on a basis of a transfer clause.

also normal that these benefits do not influence each other. So it is possible to collect full benefits from each of several accident insurances.

There is one exception from this principle. A substantial amount from a life insurance may be taken in account when determining the damages to a survivor (cf below section 5.5).

## **5 Rules for the Assessment of Damages for Personal Injury<sup>12</sup>**

### **5.1 General Remarks**

The fundamental principle according to the Tort Liability Act is, as mentioned above, that full compensation should be given for the injury caused. It is not easy to implement this principle in practice. In many cases it may be difficult to ascertain the extent of full compensation.

This does not only apply to non-financial damage which, for obvious reasons, must depend on a rather subjective judgement. It also applies to material damage, primarily the part of it which concerns future loss of earnings. Here the settling of compensation often depends on an arbitrary estimate of the size of the loss. It is only up to a certain limit possible to lay down in the law itself criteria designed to facilitate its implementation.

Earlier the law gave very little guidance concerning how to implement the rules. The provisions consisted on the whole of a mere list of possible items for compensation. It has during earlier decades been left to practice to define the norms to be followed. Hardly in any legal field in Sweden has legal practice, either that of Courts or that of insurance companies and their advisory boards, had such an importance for the development of the legal rules.

With the law of 1975 a further step was taken in the direction of more concrete guidance, even if the basic rules still are very brief and depending on a practice that explains and advises. The law has made use of much of the experiences acquired in the implementation of the old provisions. Yet, not only legal principles regarding damages have been used as a basis for innovations, but also elements which have been tested within other arrangements for compensation. It seems natural to try to apply uniform principles to different compensation systems which are working together as collateral benefits, e.g. when appraising the effect on the injured person's future ability to work. The rules on damages have also been influenced in other respects by their close relationship with other forms of compensation in the society.

During the decades since 1976 court practice as well as practice from the advisory boards has on important points explained how to understand the law. In the following some facts about the rules and how they are interpreted today are presented.

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<sup>12</sup> A survey of the legal practice is to be found in the Commission's report, p. 62.

## 5.2 *Compensation for Loss of Earnings*

This kind of compensation often accounts for the bulk of the damages payable to the injured person himself. Compensation for loss of earnings during the time before the case is settled is based on the actual loss, i.e. the difference between what the injured would have been able to earn if the accident had not occurred, and the income he has or ought to have earned in spite of the injury. In earlier practice it could happen that the compensation even for passed time was fixed on an abstract basis, mainly the medical degree of disablement, in spite of the fact that the actual loss was known. The best evidence is of course the real loss as shown by the actual development.

A more difficult issue is the settlement of compensation for future loss of earnings. A typical feature of earlier court practice in this field was the use of medical degrees of disablement, in spite of the fact that this system originally was developed for the purpose of indicating the effect of a given bodily injury on the working capacity of a manual worker in a society existing several decades ago<sup>13</sup>. Even if revised medical degree of disablement can not be regarded as providing an adequate yardstick for judging the effect of the injury's influence on an individual's working capacity. Their only function was earlier as well as today to give an appropriate measure of the reduction of functional ability caused by the injury. Using only the medical degree of disablement when settling compensation for loss of earnings can thus give over-compensation as well as under-compensation in relation to the actual loss. Where damages do not agree with the actual loss of earnings, they have in fact the function of compensation for costs, inconveniences and troubles of various kinds due to the injury, i.e. almost as compensation for non-financial damage.

The rules in the Tort Liability Act, chapter 5, introduced a "concept of economic disablement", very similar to that existing in the National Insurance legislation. Regard is taken to the income which the injured person "could be expected to have earned by such work as corresponds to his strength and ability and can reasonably be expected, taken into consideration his earlier training and activities, rehabilitation or any other measure, as well as his age, housing conditions and any comparable circumstances" (5:1, paragraph 2).

Medical disablement assessment has not lost all its importance, but may only be regarded as a measure of the reduction of functional ability caused by the injury in question. When measuring compensation for non-financial damage, the medical degree of disablement is often of decisive importance.

Great difficulties can in some cases be involved in the assessment of compensation for certain categories, especially young persons (children, students etc). They might never have had a gainful employment, and perhaps is their career in an occupation completely spoiled by the accident. The opinion in practice is more and more that they shall have compensation not only for costs

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13 The medical degrees of disablement have been revised several times during recent years, latest occasion see "Gradering av medicinsk invaliditet 1996", Försäkringsförbundet och IFU. But they were very long time before that used more or less in their original shape.

of care but also for future income they are estimated to have lost as a result of the injury.<sup>14</sup>

An economic disablement concept is not complete unless future changes in the injured person's medical status or working conditions are allowed to have some effect on the amount of compensation he receives. For this reason a regulation exists that makes it possible to raise or reduce a life annuity for loss of earnings or loss of support in the event of any future major change in the conditions on which the fixing of the amount originally was based (5:5, paragraph 1)<sup>15</sup>. The future changes must be essential - if not it could be said that the possible changes in many cases are taken care of by a certain "safety margin" when fixing the compensation. Changes in monetary value are compensated according to a separate law (Law No 1973:213),<sup>16</sup> See below. Awards for non-economic prejudice cannot be adjusted afterwards.

As mentioned above, compensation for loss of earnings in the past is evaluated so as to correspond to the actual loss. In the case of a major injury with influence on the injured's maintenance, payments on accounts are made by the insurance company, to be deducted from the final compensation sum<sup>17</sup>. The payment can take the form of a (preliminary) annuity or a lump-sum, depending of the circumstances.

The use of annuities for future loss of income is a time-honoured tradition in Sweden. It is in many respects an easier method of payment. But above all it has been considered preferable for social reasons to pay the injured person his compensation by regular instalments. This makes it possible for him to cover his own and his family's need for continuous maintenance. If he was given a lump sum instead, he might soon have spent it all with future financial problems as a possible consequence.

The progress of the society has however changed the picture. The growth of other compensation schemes, social insurance in particular, has caused damages to lose much of their significance for the continuous basic maintenance of the injured person and his family.

Damages are now in most cases a supplementary form of compensation to ensure that the injured person covers his loss up to the full level of compensation, making it possible for him to keep his former standard of living. It can therefore, at least in many cases, rightfully be questioned whether the principle of annuities should be retained. However, the view of the law is that annuities still is the main rule in cases where they are of major importance for continuous maintenance of the injured person (5:4, paragraph 1). A capital sum could be considered as an alternative in other cases. It is also possible to combine an annuity with a capital sum, if there is a need for an investment in

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14 See the Commission's report p. 29.

15 Amendments in this rule has been proposed by the Commission.

16 The indexing of annuities according to this law causes very high total outlay in a severe personal injury case. There are cases were SEK 5-6 million has to be reserved to secure future payments of the annuity.

17 Such payment on account can also be made for other indemnities, such as costs and pain and suffering.

e.g. a home or an enterprise.<sup>18</sup> The rules about the form of payment are optional. The injured person is thus entitled to an annuity even where no need for continuous maintenance is to be expected. It is more doubtful whether he should be entitled to a capital sum where such need for maintenance exists.

A preference for the annuity in such a case is indicated in the paragraph. It has been said in the motives that the one who has to pay the damages - in most cases an insurance company - has a social responsibility in this matter. The payer has to take into consideration the social consequences of the form of payment.<sup>19</sup> In practice no serious problems have emerged in the interpretation of what has been said about the choice of payment. The rules about indexing of annuities most probably gives this form a preference far beyond what was imagined by the legislator.

An annuity can be converted into a capital sum, for instance, if the social security benefits eventually proves to be sufficient for the continuous maintenance of the injured person. If this is the case, he can be allowed to convert the annuity into a capital sum to be used in accordance with his own wishes. A partial conversion is also possible. A seriously handicapped person may for instance need a capital for rebuilding his home.

The indexing of the annuities is regulated in the following way. Since 1974 all annuities within the Tort Liability field are protected against inflation within a frame of 5 percent per annum. If the inflation one year does not reach 5 percent there is no index addition.

However, it is under certain conditions possible to take the percentage of the actual inflation into account coming year, so that it can be possible to reach the necessary level of 5 percent that year, or even exceed it. Since the annual inflation rate in Sweden for the time being (1998) is far below 5 percent a year, this mechanism is of special importance. At the time when the law of indexing annuities was written (1974) the inflation rate was normally much higher, and therefore it is also possible to “save” what is over the 5-percent-level to the next year.

There are also special rules concerning taxation of capital sums awarded as compensation of loss of income, which means that a certain part (40 percent) of the sum is free from income tax. The taxation rules might otherwise have devastating consequences for a person awarded a considerable capital sum, which should largely have disappeared in taxes.<sup>20</sup>

### **5.3 Indemnity for Non-financial Injuries**

Increasing importance has been attached in recent years to indemnity for non-financial consequences of the injury. They include such consequences which cannot be measured in monetary terms, particularly physical or psychological

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18 A reason for the injured to prefer an annuity is the favourable indexing of the compensation form.

19 See Government Bill 1975:12 p. 114.

20 Compensation for non-economic losses is free from tax, whether paid in the form of a lump-sum or - very rarely - an annuity. Compensation for loss of income in the form of an annuity is taxable income.

suffering and various circumstances which may make it difficult for the injured person to live a normal life.

Several factors have contributed to the increased emphasis on the non-financial consequences. One is connected with the dominant importance of the benefits from the National Insurance and benefits paid by employers and private insurances for the economic consequences of personal injury. Compensation for non-financial injuries is only known in the law of torts and the insurance systems connected to this law.<sup>21</sup> Another factor is connected with the general increase in prosperity and standard of living in today's society, which makes handicaps such as an amputated leg, a mutilated face, blindness or impotence harder to bear.

For those reasons, indemnity for non-financial consequences of an injury has come more and more in focus. During the latest decades, indemnities have been much increased. It is, however, the opinion of the Parliament and in other influential institutions that the compensation level on this field in Sweden is not sufficient compared with other countries in Europe.<sup>22</sup> A Commission with the task to consider this and other issues relating to non-financial damage was therefore appointed in 1988 by the Minister of Justice.<sup>23</sup> The Commission published its final report in 1995 (SOU 1995:33 *Ersättning för ideell skada vid personskada*).<sup>24</sup> The report is now under consideration in the Ministry of Justice (June 1998).

The Commission outlined some general principles concerning non-financial damages. One of them was that an injured person should receive, through

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21 It can be noted here that in Sweden it is possible to take out an insurance covering also non-material consequences of personal injury for the insured himself. The insurance companies offer different kinds of accident insurance for leisure time, including compensation for pain and suffering, permanent disadvantages etc.

22 Dr. iur. Paul Szöllösy, former Head of Swiss Re's Claims Department, Zurich, has published surveys of compensation rules in some European countries. One is "Recent Trends in the Standard of Compensation for Personal Injury in a European Context", published in *Nordisk Försäkrings Tidskrift (NFT)* nr 3/1991, p. 191. Another is "Compensation for personal injury in Western Europe. Principles, practice and recent developments in the field of non-pecuniary loss in eight countries", published in *NFT* nr 3/1994, p. 221. One of his conclusions is that the influence of the standard of living on the compensation level is strong, though to a varying degree, depending on the characteristics of the compensation practice of the country in question. Sweden is not compared with other European countries in the surveys, but it is obvious that the Swedish standard of compensation is not the highest in Europe, nor the lowest. Rather somewhere in between. - *Comité Européen des Assurances* has also recently published "The Principles Governing Compensation for Bodily Injury in Europe. Comparative Study in Nine European Countries" (undated). Nor this publication gives other indication than that the Swedish compensation level is fairly comparable to many other European levels.

23 Chairman of the Commission was Edvard Nilsson, Member of the Supreme Court of Sweden.

24 One of the conclusions in the report (p.27) is: "Just a few short years ago, the primary purpose of damages within the sphere of personal injury was to provide compensation for non-financial losses. However, recent trends, including the continual reduction of social welfare insurance benefits, have rendered damages a much more important source of compensation for economic losses resulting from personal injury". This opinion is one of the arguments for the Commission to present proposals not only on matters of compensation for non-financial injury but also as well some actual problems concerning economic damage.

damages, full compensation for his losses. However, the question whether a particular non-financial loss should be assessed at 10.000, 100.000 or 1.000.000 SEK is still essentially a legal policy question. On the other hand it is, according to the Commission, important to determine damages in such cases on the basis of criteria that are as consistent as possible, to prevent decisions becoming entirely arbitrary. Such criteria might include the length of time during which the effects of the injury are felt, the intensity of the pain and the degree of physical disfunction caused by the loss. The Commission therefore felt that the current system, which entails the application of standardized criteria of this type to assess non-financial losses incurred as a result of a personal injury, is acceptable.<sup>25</sup>

About the Commission's opinion on the compensation level see below. The compensation system today consists of the following items, enumerated in the Tort Liability Act, 5:1, paragraph 1 p 3.

### **5.3.1 Pain and Suffering (“Sveda och värk”).**

Damages of this kind compensate for mental anguish and physical pain during the acute period of illness. The compensation is settled according to standardized schemes, based on objectively quantifiable criteria.<sup>26</sup> The amount depends on the length of the hospital treatment, the pain suffered during the treatment, the confinement to bed and similar factors.<sup>27</sup> The maximum amount per month during hospital treatment is (1998) 4.500 SEK in case of a serious injury and 3.300 SEK in case of a less serious injury. If not hospitalized, the injured gets a reduced amount, 2.000 - 1.100 SEK per month. The maximum total amount is now about 100.000 SEK.

The Commission does not propose any major changes concerning pain and suffering. A proposal is that the norms should be revised to make a more accurate evaluation possible in cases involving psychological damage. They should be expanded to include - in the same manner as for physical injury - guidance in determining what can be regarded as profound psychological damage, and what forms of psychiatric treatment should constitute grounds for an increase of basic compensation.

### **5.3.2 Disfigurement or Other Permanent Disadvantage, or Compensation for Medical Disability (“Lyte eller annat stadigvarande men. Ersättning för medicinsk invaliditet”).**

The damages compensate for permanent injury in the form of physical or psychological impairment. The reparation is graduated according to age and severity of disability. Of almost decisive importance is in practice since 1st July

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25 The report p. 27.

26 The schemes are confirmed by the Traffic Accident Board. The use of such schemes is accepted by the Supreme Court (NJA 1972 p. 81).

27 See the report p. 30.

1996 the medical degree of disablement as settled in the new type of tables.<sup>28</sup> The amount of compensation corresponding to each medical degree and the age of the injured person is settled yearly.<sup>29</sup> For some injuries it is not possible to settle the compensation on the grounds of medical disablement, e.g. obstacle to childbirth, miscarriage, loss of smell and taste and loss of spleen. In these cases appropriate amounts are proposed in the norms. Compensation for disfigurement follows certain guidelines taking into account such factors as how salient and disfiguring the consequences of the injury are. The maximum amount for permanent disadvantage is now about 800 000 SEK (1998).<sup>30</sup>

The Commission proposes that damages for permanent disadvantage should continue to be assessed primarily on the basis of the injured party's degree of medical disability and age at the time when the disability was incurred. The Commission approves the new tables of medical disability, making it possible to directly relate compensation to a certain degree of medical disability.<sup>31</sup>

### 5.3.3 Other Inconveniences (“*olägenheter i övrigt*”)

The reforms of the Law of Tort in 1976 reinforced compensation for non-financial injuries through a new item of compensation called “other inconveniences”. It was chiefly a consequence of the concept of economic disablement that was introduced as part of the reform. In order to ensure that the system introduced did not place a person in a less favourable position than previously, it seemed natural to supplement the concept with an item of compensation for other inconveniences resulting from the injury. In earlier practice compensation was given for loss of income only according to the medical degree of disablement, even in cases where the injured had not incurred such a loss. The compensation could thus be estimated as a kind of reparation for non-financial injury.

Under the item “other inconveniences” indemnity shall be paid, as a complementary to the other items of non-financial damages, for general inconveniences which the injury causes especially in the working life of the injured, among others

- the greater effort he may have to make to achieve a specific quota of work,
- the greater risk that he may suffer loss of future extra income from overtime work,
- temporary loss of income resulting from absence from work because of various effects of the injury.

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28 “Gradering av medicinsk invaliditet 1996”. In practice, since the beginning of the use of the new tables the item is named “Compensation for medical disability”, instead of the legal term “Compensation for disfigurement or other permanent disadvantage”.

29 Also these norms are confirmed by the Traffic Accident Board. They assume that practically all types of injury is strictly based on a degree of disability.

30 A 25 year old person, with a medical disability of 99 percent, gets 722.200 SEK. If the injured is 15 year old or younger he gets a 10 percent increase in the amount.

31 The new norms and tables were worked out in cooperation between among others the Commission, the Traffic Accident Board and the Liability Insurance Personal Injury Board.



Certain other losses can also be regarded as compensated by this item, such as minor increases in the cost of living because of the injury. Similarly to other non-financial compensations also this indemnity is generally paid in the form of a lump sum, but the estimate is normally founded on an amount per annum.

Compensation for other inconveniences can be regarded as an addition to the compensation for incapacity. It was originally very closely tied to the compensation for permanent disadvantage.<sup>32</sup> There is now a fairly stable practice for how to settle the amount. There was however much dispute earlier about the distinction between this category and the others on the non-financial side.

Further complicating the matter was the question of which factors should influence the assessment in individual cases. Certain norms have been developed in practice, with different levels for the individual case to be insert in. These norms also include costs of different kinds, and normally all the factors are estimated per annum. The top amount is about 8 000 SEK a year, which is capitalized to a lump sum. The maximum level of such a sum is for the moment about 800 000 SEK. Up to a medical degree of 15 the amounts are standardized according to this degree. A person 25 years old with an injury reaching a medical degree of 25 percent may get a sum of about 100 000 SEK for “other inconveniences”.

The Commission’s solution of the problems in interpreting the category of “other inconveniences” in practice is that the standard amounts for “other inconveniences” should in the future be included in the compensation awarded for disfigurement or other permanent disadvantage, which would thus be increased correspondingly.

And if the inquiry into a damage case reveals that the injured person, as a result of special conditions, must be regarded as having sustained inconveniences clearly exceeding those which can be redressed with the compensation specified in the tables for disfigurement or other permanent disadvantage, additional compensation should be provided from a new category of damages, “special inconveniences”.<sup>33</sup> The Commission also proposes some other guidelines for how to practice the new category.

### **5.3.4 The Compensation Level**

As mentioned above (section 5.3) opinions have been voiced in Sweden about the level of compensation for non-financial damages being too low. One of the primary tasks for the Commission was to consider whether the level should be raised. Based on the result of a comparison with the levels of compensation in other countries, the Commission recommended that damages for non-financial losses should be raised significantly in cases involving the most serious injuries. Levels should also be raised, though more moderately, for injuries that are not

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<sup>32</sup> See Government Bill 1975:12 p 110.

<sup>33</sup> The report p. 32.

quite so serious.<sup>34</sup> Compensation levels for minor injuries should, however, remain essentially unchanged.

#### **5.4 *Indemnity for Costs***

The principle of full compensation also applies to different types of costs due to the injury. Many of these costs are compensated by the social insurance or other sources, but if not it is possible to get damages. As mentioned costs may be compensated together with or included in the compensation for “other inconveniences”. In more severe cases with permanent needs involving costs compensation can be given in the form of an annuity.

#### **5.5 *Compensation for Loss of Maintenance***

The rules are to be found in 5:2 in the Tort Liability Act. In case of death compensation can be awarded for funeral costs and also other costs, if reasonable. A person entitled under the rules of family legislation to maintenance from the deceased has a right to indemnity for the loss of maintenance. The obligation to pay such maintenance need not have existed at the time of death. It is sufficient that it was expected within the near future. And a person dependent on maintenance, although this was not an obligation of the deceased, is entitled to indemnity for the loss of maintenance paid to him before the death of the deceased, or where he could expect such a maintenance within the near future. The rules were in 1976 adapted to actual conditions in modern society, particularly to the custom of couples living together without being married but each contributing to the maintenance of the other in the same way as a married couple. In such cases the indemnity rules are more liberal than those of other compensation systems, e g the social insurance.

Earlier, or before 1976, only compensation for “necessary maintenance” was awarded. A test of the need was to be applied. The present rules reflect the principle of full compensation for the loss suffered. The survivor shall be placed in the same economic position as he would have been if the breadwinner were still alive. However, accounts should be taken of ability of and the possibilities for the survivor to contribute with his own work or in other ways to his maintenance. The normal rules of coordination between damages and other benefits are to be applied (cf below), but account is to some extent to be taken also to benefits which are not deductible under the coordination rules, e g amounts from the deceased’s life insurance.

“Maintenance” is not only maintenance by economic contributions in various forms but also the value of the deceased’s (unpaid) work in the household.

Damages for loss of maintenance payments are in most cases in the out-of-court claims settlement system assessed on the basis of a standardized scheme,

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<sup>34</sup> The report p. 33. The Commission gave quite detailed advises how to realize the rise in levels. It is to be noted that the Traffic Accident Board and the other advisory boards already have shown a clear ambition to comply with the ambitions of the Commission.

relating the damages to the survivors' need of maintenance.<sup>35</sup> According to these schemes, a widower/widow is entitled to retain about 40 - 60 percent of the family's gross income-level. A child's need of maintenance is estimated to (1998) 36.000 SEK a year. There are also other norms of this kind in the practice of the Traffic Accident Board.

When the indemnity is of major importance for the support of the survivor, loss of maintenance is compensated in the form of an annuity. In other cases, benefits to the survivor often cover the need of compensation, perhaps together with the survivor's own ability to have a gainful employment. In these cases it may be sufficient to compensate only for temporary needs with a lump sum, the object of which is to cover difficulties in the accommodation to the new situation after the death of the breadwinner.

According to fundamental principles in Swedish tort law there are no right to compensation for non-financial damages in fatal cases, such as an amount for the pain of the loss of a dear family member. It has not even been discussed during the latest years, although there is certainly an opinion among many people for an introduction of such rights in the tort law.

An interesting question in this respect is what happens with the right to damages for non-financial losses if the injured person dies before damages is established by judgement or agreement. According to today's practice the right lapses in such a case, but the Commission proposes an amendment in principles currently in effect so that the right to damages for non-economic losses will be transferred to the injured party's heirs if a request for such damages has been submitted prior to the death of the injured.<sup>36</sup>

## **6 Coordination of Damages and Other Benefits (cf 4.3)**

Damages relating to injuries to person are almost always paid together with other compensation, most frequently in the form of benefits from the social insurance or benefits financed by the employer. General rules governing when and in what manner other benefits of this kind shall affect liability for damages were introduced in 1976 in the Tort Liability Act 5:3 (amended Law nr 1995:1190). To a large extent different principles apply to different kind of benefits.

As regards social insurance benefits, a full deduction is made. This links with the rules in the social insurance legislation under which the injured party is free to claim damages over and above any compensation due (cf. 20:7 the National Insurance Act, Law No 1962:381, and 6:7 the Industrial Injuries Insurance Act, Law No 1976:380). As a consequence of these rules the victim is entitled to

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<sup>35</sup> See the Commissions report, p. 34. The Commission has no objection to this procedure provided that a survivor who can prove greater maintenance needs can be awarded greater damages than would follow from the standardized scheme. The scheme is in practice applied in this manner. The basic opinion of the Commission is else that, as regards damages for economic losses, the amount should not be based on some standardized scheme, but rather that the actual loss incurred should be compensated even if it may be difficult to assess that loss (the report p 27).

<sup>36</sup> The report p. 35.

claim damages only for that part of his loss which is not covered by the social insurance. This justifies the deduction when fixing the level of liability. The point is to avoid over-compensation with the help of social insurance benefits.

Since in respect of the social insurance benefits, right of recourse may not be executed against the party liable for damages, it is to his advantage that social insurance covers part of the victim's loss. Social insurance thus operates also to the advantage of the liable party, or his insurance company. This aspect is easy to justify on the grounds that the liable party has also taken part in financing the social insurance scheme by means of taxes and other contributions.

Deduction is the main rule in the case of employer's benefits, whether paid out directly or through insurance, whether sick pay or pension. The rule was amended in 1995 to get this general purpose. Deduction of benefits paid out directly is primarily justified on the grounds that the employer is entitled to exercise the victim's right to claim compensation elsewhere to the extent that he has paid compensation to the employee.<sup>37</sup> The deduction of employer's benefits paid out directly is also in accordance with principles which have developed through legal practice. Earlier, the position was different in the case of employer's benefits paid out on the basis of an insurance, such as a collective or individual superannuation fund like the ITP-plan or collective health insurance, such as the AGS-insurance. The insurance in such a case is in principle a sum insurance, and under article 25 of the Insurance Contracts Act no recourse is permitted, if not specially stipulated in the conditions. Most superannuation or health insurance benefits of this kind are, however, fairly closely related to the loss - they cover loss of income on certain levels. Therefore it was decided in the rules of 1976 that collective superannuation funds as well as benefits from collective health insurance should be deducted from the damages, to avoid a clear over-compensation.<sup>38</sup> The same position was taken in regard of individual superannuation funds in 1995.

The result is that all benefits emerging from the employment, whether sick-pay or pension, are reducing the damages. Benefits from an insurance, financed by the injured person himself, e.g. an accident insurance, are, however, not taken into account. It is thus possible for him to collect compensation from this kind of insurance in full, without any influence on the damages.

As the coordination follows the "net method" means in most cases that damages are fixed at a net sum, and the damages are equivalent with the net amount of the loss at the time when the damages are assessed. Subsequent changes in the size of the other benefit or benefits have no effect if they can not

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<sup>37</sup> It has been held that this is an instance of *cessio legis* and the question has been resolved in Swedish law in a number of Supreme Court rulings (NJA 1934 p. 355, 1955 p. 676 I-III). One consequence of this attitude is that the employer's rights vis-a-vis the party liable to pay the damages, or his insurance company, are no greater than those of the injured employee. In a case where the employer has been guilty of contributory negligence, for example, the full amount of sick pay or other benefit paid out by the employer is always recoverable from the person liable.

<sup>38</sup> The Supreme Court expressed its position in the case NJA 1961 p. 215: Collective superannuation insurance is to be treated as a sum insurance in the sense that no deduction was to be made. The insured employee was thus enabled to get his pension without any effect on the compensation that the person or insurance responsible for the damages had to pay out.

be foreseen at the time the damages are fixed.<sup>39</sup> And there is no ground for recourse action, as there are no right to subrogate in.

## 7 Some Final Remarks

The rules on compensation for personal injury introduced in Swedish law in 1976 has now been in practice, with only minor amendments, for more than two decades. This is enough space of time to judge their adequacy in the society of today.

An excellent analysis has been made by the Commission, resulting in some amendment proposals. These proposals have on some important points already influenced the legal practice, but a revised legislation is still pending.

There are some possible reforms not taken up by the Commission. The reform in 1976 was to some extent a shift from the use of standard rules to a more individual assessment of damages for economic loss.

Compensation for non-financial damages is in both the old and the new system something that primarily is taken care of by standardized norms. But using individual criteria in assessing the rest of the compensation in case of a personal injury has appeared to be more complicated and time-wasting than was perhaps imagined by the legislator in the reform of 1976. It might be of value, not least in the interest of the victims, to consider a more appropriate balance between standardized and individual factors. It is anyway never possible to get a clear and realistic picture of the future development of the individual factors determining the compensation for future loss of income or maintenance. The use of more standardized norms could be of value for both the injured person and the one who has to pay.

There is also a need to review again the role of the tort liability compensation in today's society, in relation to all other sources of compensation. That means not only the more detailed pattern of problems relating to the coordination between tort liability compensation and other types of compensation in case of personal injury. It also concerns the more universal problem of how we spend the resources available in such a case, as well as the problem of using tort rules as a preventive weapon. Furthermore: How valid is "the Swedish model" in the future, in a European perspective?

Instead of planning partial reforms the legislator ought to collect material for considering the total picture of the compensation field, from all the necessary

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<sup>39</sup> If the insurer paying out a benefit has reserved right of recourse against a possible responsible third party, compensation is converted from a non-deductible benefit into a benefit which must be deducted from the amount of damages. The coordination must follow the gross-method. That means that damages are assessed in an amount which corresponds in principle to the injured person's loss or expense. It shall be prescribed that a deduction shall be made on payment in the actual amount of the other benefit involved at time of payment. This means that damages and other benefits follow each other throughout the whole period to which coordination applies, and that total compensation at no point of times exceeds the injured party's actual loss or expense.

angels. Such considerations have been made earlier,<sup>40</sup> and now the time is ripe for a renewed effort in this respect.

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40 Ivar Strahl *Förberedande utredning angående lagstiftning på skadeståndsrättens område* (SOU 1950:16), also Government Bill 1972:5 p. 74. Cf Jan Hellner *Rättsociologisk undersökning av skadeståndsrätten* (SOU 1969:48), Jan Hellner: *Behöver vi en ny skadeståndsrätt?* *Juridisk tidskrift* 1995-96 p. 282, Bill W Dufwa: *Flera skadeståndsskyldiga*, nr 5141.