

# Innehåll

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# Abbreviations

SOU	Sveriges offentliga utredningar (Reports of Swedish committees)
Prop	Proposition (Government Bill to Parliament)
NJA	Nytt Juridiskt Arkiv (Judgements by the Swedish Supreme Court)
SvJT	Svensk Juristtidning (Swedish Legal Review)
All ER	All English Law Report
CLY	Current Law Yearbook
WLR	The Weekly Law Report

# 1. Introduction

When somebody causes damage of any kind to another person the normal remedy in law is a right to recover damages, provided that in the specific case there is a right of action<sup>1</sup>. Damages are a sum of money given as compensation for loss or harm suffered.

The essay will deal with the damages awarded for personal injury in Sweden and England. This essay does not deal with the question of liability. It is presumed, for the purpose of this essay, that liability to pay compensation has already been established, and the essay only deals with what compensation is awarded after liability has been established.

The emphasis will be on personal loss. The term "personal loss" is used to denote any kind of harm or disadvantage which flows from a physical injury, other than loss of money or property<sup>2</sup>. Personal injuries are nowadays often covered by insurance, e.g. third party insurance. The role of insurance will not be addressed in this essay. The essay will only deal with damages within the law of torts, i.e. in non-contractual relations<sup>3</sup>.

It appears to be a common perception that compensation awards in Sweden for personal injuries are very low in comparison with awards in other countries. In order to establish whether this perception is correct, the essay compares the levels of compensation which would be awarded for various types of personal losses in Sweden and England.

The essay will first make a brief comparison between Swedish law and English law in the field of personal injury. A description will then be made of the law relating to damages for personal injuries in the two countries, in particular which heads of compensation are applied. Finally the essay will compare the levels of compensation which would be awarded in specific circumstances. This last part of the essay will present a number of actual cases and an estimate will be made of what level of compensation would be given today.

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<sup>1</sup>Munkman, p.1.

<sup>2</sup>Munkman, p. 110.

<sup>3</sup>In Swedish law referred to as "utomobligatoriskt skadestånd"

There are a number of problems in comparing different legal systems. This is also the case when comparing damages for personal losses. It is for instance often difficult to separate personal losses from purely financial ones. Low levels of compensation in one country can be outweighed by insurance or other assistance. The tax systems and the cost of living vary from one country to another. A comparison of one part of two systems, as in this essay, does not therefore give a complete picture of the actual situation<sup>4</sup>.

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<sup>4</sup>See for example Roos, Carl Martin: Ersättning för ideell skada-ett internationellt perspektiv, SvJT 1989 s 356.

## 2. Basic features of Swedish and English law

Swedish law is based mainly on statute, even though case-law is also important, especially in certain fields of law. In Sweden many decisions relating to personal injury are taken by committees, and not by the courts. For example injuries due to traffic accidents are dealt with by Trafikskadenämnden (the Road Traffic Injury Commission) which is by far the most important of the committees. One interesting aspect of the Road Traffic Injury Commission is that it is not a public authority, but a private body. This means that much of the jurisprudence concerning personal injury cases is developed by a private body. There are also other committees awarding compensation for personal injury, for instance Brottsoffermyndigheten (the Criminal Injuries Compensation Authority). Since many of the decisions are taken by committees, there are comparatively few cases concerning damages that are decided by the courts'. The decisions of these committees are therefore also of importance for the development of the law of personal injury, since the committees have to award compensation for the same heads of damages as the courts<sup>5</sup>.

English law is based mainly on case-law, although statutes are becoming more important. The majority of personal injury cases are decided by the courts, and not by committees as in Sweden. There are however some committees also in England. For example, the Criminal Injuries Compensation Authority<sup>6</sup>, which corresponds to the Swedish Brottsoffermyndigheten. The Criminal Injuries Compensation Authority was set up under the Criminal Injuries Compensation Act 1995<sup>7</sup>.

The lower English courts used to include a jury, but since the 1970's juries are no longer to be used for assessing damages save in exceptional cases<sup>8</sup>. The decisions in the lowest courts are usually taken by a single judge.

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<sup>5</sup>Nordenson, Ulf: Ideell ersättning och kostnadsersättning vid personskada-några tillämpningsproblem, Festskrift till Jan Hellner, 1984, p. 396.

<sup>6</sup>This authority replaced the Criminal Injuries Compensation Board in 1995.

<sup>7</sup>The Criminal Injuries Compensation Authority administers the Criminal Injuries Compensation Scheme, set up by the Secretary of State of the Home Office under the 1995 Act.

<sup>8</sup>Clerk & Lindsell: On Torts, 17th edition, 1995, London, p. 1438.

Personal injury cases are in first instances decided by the High Court of Justice, provided however that claims for less than £50,000 are decided in the County Courts<sup>9</sup>. These decisions can be appealed to the Court of Appeal and finally to the House of Lords. The House of Lords takes up a case only if leave has been given by the House itself or by the Court of Appeal.

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<sup>9</sup>Munkman, p. 171.

## 3. Swedish law

### 3.1. Development of personal injury law.

Swedish law of torts has historically had a connection with criminal law. In the Middle Ages the laws contained rules on fines of different kinds for, among other things, personal injury<sup>10</sup>. The amounts of the fines were specified in the statutes, and varied for different types of injuries. Nursing costs were compensated through a special penalty, which in its entirety went to the plaintiff<sup>11</sup>. There was no special compensation for loss of income, but this was indirectly compensated for by the fact that the amount given as a fine was specified in the statute and the compensation could be higher than the actual costs. In such a case the excess amount could be seen as compensation for loss of income. Usually the plaintiff got one third of the penalty, while the King got one third, and the "härad" (county) one third. The sum that went to the plaintiff can be compared to damages<sup>12</sup>. Personal losses were not indemnified by special compensation, with the exception of the "disability penalty" that was given to the plaintiff in cases of battery<sup>13</sup>. The special compensation was meant to compensate for disfigurement and other permanent disadvantages and was set in relation to the injury sustained.

These principles were basically maintained in the Swedish Code of 1734. But the Code also contained a rule that a plaintiff who had been the victim of intentional battery had, besides the fine, also a right to compensation for medical costs and other expenses and for impediments in his livelihood, i.e. loss of income, and for pain and suffering<sup>14</sup>. It was not until the middle of the nineteenth century that the penalties disappeared and damages became independent of criminal law.

The general rules on damages could then be found in Chapter 6 of the Penal Code (Strafflagen), of 1864. The rules came to be applied also to acts that were not criminal. The basic premise in the Penal Code for awarding damages was negligence. If damage to property or personal injury occurred, damages were awarded independently of whether a crime had been committed provided the

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<sup>10</sup>Ekstedt, Olle: *Ideellt skadestånd för personskada*, 1977, Lund, p. 25.

<sup>11</sup>SOU 1995:33, s 62.

<sup>12</sup>Hellner, p. 27.

<sup>13</sup>SOU 1995:33, s 62.

<sup>14</sup>Ekstedt, Olle: *Ideellt skadestånd för personskada*, 1977, Lund, p. 26.

tortfeasor's act was wilful or negligent. Compensation was given for medical costs and other expenses, for loss of income, for pain and suffering, as well as for disfigurement and other permanent disadvantages. Chapter 6 of the Penal Code was in force until the Tort Liability Act came in 1972, when the existing order was basically taken over in the new Act. After a reform in 1975, the rules concerning personal injury got their present wording and position in the Tort Liability Act.

In December 1988 the Government set up a Committee to examine the rules concerning compensation for personal losses in connection with personal injury (the Committee on personal injury). The Committee presented separate reports on HIV and on compensation for physical distress. The Committee's final report was published in 1995 under the title "Compensation for personal losses in personal injury"<sup>15</sup>.

### **3.2. Tort Liability Act**

The central legislation on damages is the Tort Liability Act of 1972. The provisions in the Act regarding civil liability for loss, injury, or damage shall be applied unless otherwise provided by law or under a contract and subject to any applicable rules or principles governing contractual liability<sup>16</sup>. The Act does not require that a crime has been committed, even though this is often the case when there is a personal injury, but only that the act was wilful or negligent<sup>17</sup>. The Act deals mainly with personal injury and property damage<sup>18</sup>, which make up a large proportion of the injuries and these injuries are socially important<sup>19</sup>.

The Tort Liability Act does not define what personal injury is, but this is left to be defined by jurisprudence. In the majority of cases there is no difficulty in deciding what are personal injuries<sup>20</sup>, namely the physical or mental defect caused to the victim, which is a direct result of the act<sup>21</sup>. The defect may be a mechanically created direct injury on the body (a crushed foot, flesh-wound, internal bleeding etc.), may have been created through poisoning or radiation or the like (destroyed tissues, internal illness etc.) or may be of a mental nature. When in connection

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<sup>15</sup>SOU 1995:33 Ersättning för ideell skada vid personskada.

<sup>16</sup>Tort Liability Act, Chapter 1, Section 1.

<sup>17</sup>Tort Liability Act, Chapter 2, Section 1.

<sup>18</sup>Hellner, p. 94.

<sup>19</sup>Hellner, p. 93.

<sup>20</sup>Hellner, p. 377.

<sup>21</sup>Prop 1975:33, s 20.

with an unpleasant experience a person is affected by mental shock, damages for personal injuries can be awarded. Physical injuries are compensated only if there is a medically proven effect. According to the Tort Liability Act (Chapter 1, Section 3) the rules on personal injury are also to be applied to suffering caused through defamation and other non-physical influence, usually described as damages for "psychological distress"<sup>22</sup>. Finally there is also a personal injury if somebody dies as a result of his injuries<sup>23</sup>. When personal injury is caused wilfully or negligently, i.e. the conditions necessary for establishing liability, the act is usually a crime<sup>24</sup>, even though, as already mentioned, that is not necessary to constitute liability.

The basic principle when determining the amount of damages is that the plaintiff shall be placed in the same economic position as he would have been in, had the event not occurred<sup>25</sup>. It means that the plaintiff's economic situation before and after the event has to be compared. But personal injuries can never be fully compensated in monetary terms<sup>26</sup>.

Personal injuries can also lead to losses for others than the person actually injured. The main rule is that only the person actually suffering personal injury is eligible for damages, and consequently not a third person who indirectly suffers losses<sup>27</sup>. A psychological shock that somebody suffers, as a result of injury to someone else, can be seen as personal injury and may be compensated in certain circumstances, if medically proven<sup>28</sup>. Suffering caused by somebody else's death is not otherwise compensated under Swedish law.

A basic principle in Swedish law is that financial losses are compensated provided there is liability to pay damages, even if it is not specified in a statute or contract, while damages for personal losses require support in a statute or in a contract<sup>29</sup>. A person who suffers personal injuries can under the Tort Liability Act get compensation for both financial and personal losses.

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<sup>22</sup>Similar to "aggravated damages" in English law.

<sup>23</sup>Prop 1975:33, s 20.

<sup>24</sup>Hellner, p. 113.

<sup>25</sup>Hellner, p. 357.

<sup>26</sup>Roos, Carl Martin: Ersättningsrätt och ersättningssystem, 1st edition, 1990, Värnamo, p. 141.

<sup>27</sup>Hellner, p. 362-363.

<sup>28</sup>Hellner, p. 363.

<sup>29</sup>Hellner, p. 368-369.

The compensation given for financial losses in personal injury cases in Sweden reaches millions of kronor yearly<sup>30</sup>. It is only a small portion of the financial losses that are compensated through damages. Much of the financial losses are compensated in other ways, for example through insurance. The National Insurance gives basic protection and compensates many financial losses. In spite of that damages are still an important way of compensating for financial losses, above and beyond what is compensated by insurance. Any compensation awarded from the National Insurance shall be deducted from damages<sup>31</sup>.

The main rule in the Tort Liability Act concerning compensation for personal injuries which are not fatal is Chapter 5, Section 1<sup>32</sup>. The compensation is divided into three heads:

- ? 1.nursing costs and other expenses,
- ? 2.loss of income,
- ? 3.pain and suffering, disfigurement and other permanent disadvantages, and other inconveniences<sup>33</sup>.

The two first heads concerns financial loss and the third concerns personal loss.

### **3.3. Compensation for financial losses**

#### **3.3.1. Nursing costs and other expenses.**

The plaintiff shall in principle have full compensation for all expenses that arise due to the injury<sup>34</sup>. This means that compensation is given for extra costs due to the event but not for expenses that the victim would have had anyway. The cost of stay in hospitals is usually not paid by the tortfeasor but is instead paid for under the National Insurance system. What is not compensated under that system, or by private insurance, can be claimed for as damages<sup>35</sup>. There is normally no difficulty in establishing the amounts of the costs since the costs can usually be established by receipt, but there can be disagreement as to whether a specific cost was necessary. The victim has a duty to chose the cheapest care adequate for his needs. The costs compensated are usually only within what is normal standard. The plaintiff can get more expensive care compensated, for example care in his

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<sup>30</sup>Hellner, p. 373.

<sup>31</sup>Tort Liability Act, Chapter 5, Section 3.

<sup>32</sup>Prop 1975:12, s 1.

<sup>33</sup>SOU 1995:33, s 21.

<sup>34</sup>Prop 1975:12, s 21.

<sup>35</sup>Hellner, p. 378.

home<sup>36</sup>, if justified for rehabilitation or other social reasons. The victim can also suffer other costs, for example for journeys. Relatives may incur costs, for example for relatives' journeys to the plaintiff's sickbed or funeral. Those costs can also be claimed as damages<sup>37</sup>. The Supreme Court has in one case given compensation for a son's trip home from Australia to see his dying father<sup>38</sup>.

### **3.3.2. Loss of income**

Loss of income is determined for two different periods, i.e. past loss of income and prospective loss of income.

Compensation for past loss of income should correspond to the actual loss and is awarded by comparing the situation before and after the event<sup>39</sup>. This calculation usually does not cause much difficulty if the injured party is employed and therefore has a salary which is lost<sup>40</sup>. Most injured people suffer no lasting problems and can return to work.

The comparatively few people who suffer lasting injuries receive a large part of the compensation for loss of prospective earnings<sup>41</sup>. The compensation for such loss is calculated when the victim's condition has been stabilised, and the future effects of the injury can be assessed. The calculation of the prospective loss should be made individually in every case, and should be based on a comparison between what the person would have received and what he will be able to achieve<sup>42</sup>. In the calculation, the victim's profession should be taken into account. For example a slight injury to a builder might force him to leave his job and retrain. His loss of income will be great, while his compensation for personal losses will be quite small. On the other hand a judge who is seriously injured and forced to spend his life in a wheelchair might be able to continue his job. He will then only receive a low sum for loss of income, whereas his compensation for personal losses will be greater. The compensation for prospective loss is given

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<sup>36</sup>NJA 1976 s 103.

<sup>37</sup>Hellner, p. 378.

<sup>38</sup>NJA 1982 s 668.

<sup>39</sup>Tort Liability Act, Chapter 5, Section 1, paragraph 2.

<sup>40</sup>Roos, Carl Martin: Ersättningsrätt och ersättningsssystem, 1st edition, 1990, Värnamo, p. 146.

<sup>41</sup>Hellner, p. 383.

<sup>42</sup>Tort Liability Act, Chapter 5, Section 1, paragraph 2.

either as life annuity or as a one-off payment<sup>43</sup>. Payments received from public insurance shall be deducted when the compensation is determined.

### **3.4. Compensation for personal losses**

One of the intentions behind the 1975 law reform was to separate personal losses from the financial ones<sup>44</sup>. In Sweden there is a general principle that if the compensation for personal losses is not determined before the plaintiff dies, the right to damages lapses and cannot be inherited by his heirs<sup>45</sup>. Of course the relatives have still the right to claim for losses as a result of his death<sup>46</sup>. The damages awarded when somebody dies are usually relatively low.

Compensation for personal losses is an important part of damages and one that the victim is often dissatisfied with<sup>47</sup>. Swedish law is generous as regards damages for small injuries but moderate in respect of damages for severe injuries. The Committee on personal injury suggested that the level of compensation for personal losses should be increased considerably for the serious injuries, some increase should be made for injuries that are not quite so serious, while the level of compensation for minor injuries should in principle remain unchanged<sup>48</sup>.

#### **3.4.1. Damages for mental shock.**

For mental problems to be compensated they have to be medically proven. Emotions that are a normal result of an event, such as natural rage, fear, worry and grief, do not get compensated. Swedish law has for a long time accepted that mental problems, resulting from a physical injury, are to be seen as personal injury<sup>49</sup>. Compensation for pain and suffering can also be awarded for mental shock and other mental suffering even if there has not been any physical injury. That means that the concept of personal injury comprises both mental and physical problems.

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<sup>43</sup>Tort Liability Act, Chapter 5, Section 4.

<sup>44</sup>Hellner, p. 392-393.

<sup>45</sup>SOU 1995:33, s 21.

<sup>46</sup>Tort Liability Act, Chapter 5, Section 2.

<sup>47</sup>Roos, Carl Martin: Ersättningsrätt och ersättningssystem, 1st edition, 1990, Värnamo, p. 154.

<sup>48</sup>SOU 1995:33, s 20-21.

<sup>49</sup>Hellner, p. 396.

Problems arise when the person suffering the mental problem is somebody else than the direct victim of the tortfeasor's act, for example the victim's spouse or children. As a rule third parties do not get compensated, i.e. the mother who gets a shock on seeing her dead child in hospital can not claim damages from the person who killed him. But there are exceptions that have been developed by jurisprudence.

The first situation in which compensation is given for mental shock suffered by a third party is when the person who suffered the shock was himself at the place of the event and threatened by physical injury. In 1971 a case came before the Supreme Court in which a driver of a car claimed compensation from the person causing the accident in which his parents were killed<sup>50</sup>. As a result of his parents' death he suffered mental problems that he wanted compensation for. He had been present at the accident, and had himself been in danger. The Supreme Court decided that in these circumstances he could be compensated for mental shock. But the case left open whether it was just a confirmation that persons involved get compensated also for mental problems, or if it was compensation for a third person. In 1979 the Supreme Court ruled that relatives had to be actually present at the scene to get compensation for mental shock<sup>51</sup>. In that case a woman who received a shock on being told that her mother had been murdered was denied damages. The result of those two cases was that there were only a very limited number of cases when relatives would receive damages for mental shock.

The situation was changed by the Supreme Court in 1993 when close relatives to people murdered were awarded damages for mental injuries suffered in connection with the death. In NJA 1993 s 41 I a teenage girl was raped and brutally murdered by "a friend of the family". The girl's parents and younger sister spent days looking for her before the body was finally found. Due to the gruesome way in which she had been killed they were advised not to see her, and were therefore unable to say goodbye. The parents and the sister suffered greatly and claimed compensation from the murderer for their mental problems. In NJA 1993 s 41 II a young child was drugged, sexually abused and murdered by a friend's father. The child's father had been out looking for her, and was forced to identify her once she was found. The parents claimed compensation for the mental troubles that they were suffering due to their child's death. In both cases the

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<sup>50</sup>NJA 1971 s 78.

<sup>51</sup>NJA 1979 s 620.

Supreme Court held that due to the horrendous circumstances there was no doubt that compensation should be awarded. The Court did not rule out that compensation could also be awarded in other cases, may be even when there was not an intentional crime involved, but any further expansion of relative's rights to compensation should according to the Court be dealt with by a statute. The Committee on personal injury had already been set up to consider, among other things, that issue, and the Supreme Court did not want to interfere with the ongoing legislative work. But the Supreme Court made it clear that also relatives not actually present at the scene of the crime could get compensation<sup>52</sup>.

In 1995 the Committee on personal injury presented its final report<sup>53</sup>. The Committee proposed that relatives right to compensation should be expanded even further than in the cases reported in NJA 1993 s 41, making it possible to give compensation to relatives even when there was no intentional crime involved.

In 1996 the Supreme Court followed the Committee's line and expanded the relatives' rights to get compensation for mental shock. In NJA 1996 s 377 a young boy was injured by a drunken driver in a hit and run and he later died in hospital. His sister witnessed the event, their mother came out to find her son lying on the pavement and the father came just in time to see his son taken into the ambulance. The parents and the sister claimed compensation for the mental problems that they had suffered due to the accident. The Supreme Court established that the relatives had all been at the site at the time of the accident or had come to the site immediately after the event. The Court stated that existing jurisprudence did not directly support that damage was given to people who were neither themselves in danger, as in NJA 1971 s 78, nor whose relatives' death was the result of an intentional crime, as in NJA 1993 s 41. But there were in the Court's view reasons to take a less restrictive approach to the possibility for relatives to get compensation, as was suggested in the Committee's report. While the Supreme Court stated it had to be careful in extending this area by jurisprudence, in this case the death had occurred through gross negligence in connection with intentional acts, i.e. drunk driving, and compensation could therefore be given<sup>54</sup>.

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<sup>52</sup>See also Hellner, Jan: Ersättning för psykiska besvär, SvJT 1993 s 449.

<sup>53</sup>SOU 1995:33, s 22.

<sup>54</sup>A Court of Appeal (Svea hovrätt) recently rendered a judgement (15 March 1999, DB 37) in a case where the facts were very similar to those in the case decided by the Supreme Court in 1996. The Court of Appeal also granted compensation to relatives who had not themselves been in danger.

The recent development in Swedish jurisprudence has expanded the possibilities of relatives to get compensation for mental shock<sup>55</sup>. The Supreme Court has established that even in cases of negligence compensation can be given, but it requires that the person claiming damages has some connection to the place where the event took place. The Committee has not ruled out that compensation can also be given to somebody who watches a relative being seriously hurt, but not killed<sup>56</sup>. A person witnessing somebody other than a relative being murdered is probably not eligible for compensation. It is also suggested that compensation could be given even if no crime has been committed and whether or not there is any negligence on the part of the tortfeasor.

### **3.4.2. Pain and suffering**

Compensation for pain and suffering is given for the period of acute illness<sup>57</sup>. It is awarded as a consolation<sup>58</sup>. Pain and other discomforts, worries, difficulties in sleeping and concentration, depression, and other concerns during the acute illness are compensated as much as it can possibly be compensated with money<sup>59</sup>. Suffering due to the treatment and worries about the future are included in the compensation for pain and suffering. However, normal grief and disappointment are not compensated<sup>60</sup>. Compensation for pain and suffering is not purely a compensation for personal losses, but also includes different financial losses, for example expenses for improving the plaintiff's situation during his illness<sup>61</sup>. The compensation is usually determined after the acute period is over and the situation can be overlooked.

The amount awarded for pain and suffering is determined by using tables drawn up by the Road Traffic Injury Commission. The Supreme Court has on a number of occasions confirmed the use of the tables<sup>62</sup>. The courts are of course not bound

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<sup>55</sup>This jurisprudence has also been followed by the different committees. The Criminal Injuries Compensation Authority in 1993, with reference to the Supreme Court judgement from that same year, gave compensation for mental shock to the children and a grandchild of an old man who was murdered in the famous "Lindome" case (B:7 1993:4).

<sup>56</sup>SOU 1995:33, s 22.

<sup>57</sup>SOU 1973:51, s 47.

<sup>58</sup>It is said to be given as "plåster på såret".

<sup>59</sup>SOU 1995:33, s 81.

<sup>60</sup>Hellner, p. 393.

<sup>61</sup>Prop 1975:12, s 24.

<sup>62</sup>NJA 1972 s 81, and confirmed on numerous occasions.

by the tables but the tables are given great importance, and are mostly followed by the courts. According to the tables a basic sum is given for each month of acute illness. The sum awarded per month will vary depending on several factors. Firstly the sum will depend on the type of injury, that is if it is a serious injury or other injury. Secondly the amount will depend on the type of care needed, that is if it is hospital care or another type of care. Since the award is given per month, the final sum will depend on the length of time that the acute illness lasts, which is usually the period of sick-leave. The amount given as compensation for pain and suffering is as a rule given as a one-off payment and is not co-ordinated with any other compensation awarded.

### **3.4.3. Disfigurement and other permanent disadvantages**

The person who suffers lasting consequences of a personal injury can, in addition to compensation for financial losses and pain and suffering, receive compensation for disfigurement and other permanent disadvantages. Compensation for disfigurement and other permanent disadvantages is meant to compensate for those effects of the injury that will permanently influence the victim's life. While compensation for pain and suffering is awarded for the period of acute illness, compensation for disfigurement and other permanent disadvantages is awarded for the period of invalidity, i.e. from the point in time when the plaintiff's condition has been stabilised and he has reached the state of health that he will have to live with<sup>63</sup>. Disfigurement and other permanent disadvantages is a separate head from pain and suffering, though it does happen that a single amount is given for both pain and suffering and disfigurement and other permanent disadvantages<sup>64</sup>. The compensation for pain and suffering, and for disfigurement and other permanent disadvantages is given whether or not there has been any loss of income<sup>65</sup>.

The concept "disfigurement" means physical defects, for example scars, lameness, or loss of some limb<sup>66</sup>, and humiliation due to disfigurement<sup>67</sup>. As disadvantages one takes into account other future effects of the injury, not just those that cause pain and discomfort, but also those that produce difficulties for the victim to cope with normal life, for example loss of senses, impotence and physical defects that

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<sup>63</sup>SOU 1973:51, s 48.

<sup>64</sup>Hellner, p. 393.

<sup>65</sup>Hellner, p. 398.

<sup>66</sup>Prop 1975:12, s 24.

<sup>67</sup>SOU 1995:33, s 87.

are not disfiguring (such as decreased movement, speech impediment, lost or decreased sight, sense of smell or taste, problems with artificial limbs<sup>68</sup>, lost or decreased virility, or loss of the possibility to have children)<sup>69</sup>. It is sometimes hard to distinguish between disfigurement and disadvantages, and the distinction is not really important since one sum is given for all the effects of the injury which are permanent, and from which the victim can not recover<sup>70</sup>.

The consequences of disfigurement and disadvantages can sometimes be financial, sometimes personal, but most often they are both financial and personal. To the extent that the consequences show up in costs, for example the costs of false limbs, it is possible to calculate the actual loss suffered. The purely personal losses can not be calculated accurately. In practice tables of different kinds are used<sup>71</sup>. In calculating the compensation for disfigurement and other permanent disadvantages tables are used to an even greater extent than for calculating compensation for pain and suffering.

The award for disfigurement and permanent disadvantages is decided on the basis of medical invalidity. A table of medical invalidity has been elaborated by the Federation of Insurers (Försäkringsförbundet). According to the table total medical invalidity, that is a 100% invalidity, exists if there is no functions left. All other injuries have been given a percentage of invalidity which has been set in relation to how seriously that type of injury effects a person. For example total blindness is considered having a medical invalidity of 68% as compared to an amputated big toe which only has a 3% invalidity.

In the tables drawn up by the Road Traffic Injury Commission, which refer to the medical invalidity tables, a certain sum of compensation has then been set for every degree of invalidity. For example an injury with a 45% invalidity will be awarded an amount of 193,800 SEK, compared with an invalidity of 20% which will only get 66,200 SEK. The amount is related to the victims age, and decreases as the victim gets older. The compensation is normally awarded as a one-off payment and is tax free.

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<sup>68</sup>Prop 1975:12, s 24.

<sup>69</sup>SOU 1995:33, s 87.

<sup>70</sup>Hellner, p. 398.

<sup>71</sup>Hellner, p. 398-399.

### 3.4.4. Other inconveniences

The head for other inconveniences is quite unique to Sweden, and was introduced by the 1975 personal injury reform<sup>72</sup>. This head ought to appear only in cases of invalidity<sup>73</sup>. The sums awarded for other inconveniences are considerable, at low invalidity often significantly higher than what is given for disfigurement and other permanent disadvantages. Under the head of other inconveniences fall a general increased exertion at work, risk of loss of income because of absence from work due to effects of the injury, risk of loss of extra earnings that the injury can generally cause, risk of reduced prospects of promotion, and certain extra smaller living expenses not compensated under costs<sup>74</sup>.

The amount of compensation is calculated firstly by using templates, and secondly by adding for special circumstances. Certain guidelines have been established, the so-called ABC-model, but so far the Supreme Court has not taken a view on those guidelines<sup>75</sup>. An annual amount is established and that amount is then multiplied by a life-expectance factor. Often the sum awarded for other inconveniences is given as part of the compensation for disfigurement and other permanent disadvantages. If the plaintiff is unconscious, no compensation under this head is given<sup>76</sup>. The Committee on personal injury has expressed the opinion that this head should be included under disfigurement and other disadvantages in which case the amount given should be increased correspondingly<sup>77</sup>. The Committee's suggestion in this respect has not yet been acted on, and other inconveniences is still a separate head.

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<sup>72</sup>Prop 1975:12, s 109.

<sup>73</sup>Hellner, p. 400-401.

<sup>74</sup>Petterson, Ola: Olägenheter i övrigt, SvJT 1983 s 81.

<sup>75</sup>Hellner, p. 401.

<sup>76</sup>SOU 1995:33, s 114.

<sup>77</sup>SOU 1995:33, s 19.

# 4. English law

## 4.1. Background to English personal injury law

In English law the assessment of damages is based mainly on unwritten rules that have developed in case-law<sup>78</sup>. The assessment is based on previous court decisions, so called leading cases. But in order to promote a uniform assessment by the courts, in 1992 the Judicial Studies Board published "Guidelines for the Assessment of General Damages in Personal Injury Cases", based on an assessment of a large number of court decisions. The publication gives the amounts recently awarded as damages for different types of injuries. In 1994 a second edition of the Guidelines was published, which takes into account recent trends and awards<sup>79</sup>. A tariff of levels of compensation for a large number of injuries has also been established under the Criminal Injuries Compensation Scheme.

A basic principle is that the plaintiff shall be fully compensated. Damages are as a rule decided once and for all, but Section 6 of the Administration of Justice Act 1982 has made it possible to determine damages in two stages if there is a risk that the plaintiff will in the future develop some serious disease or suffer some serious deterioration in his condition.

Damages are primarily seen to be compensatory, though there are damages with a punitive character<sup>80</sup>. If the circumstances in the particular case are specially unpleasant, the court can also give an increased award, so called aggravated damages, which is meant to compensate the plaintiff for hurt feelings<sup>81</sup>.

With regard to compensation for personal injury the courts make a distinction between general damages and special damages<sup>82</sup>. Special damages are the part of the damages for which compensation can be easily calculated because they are based on proven facts<sup>83</sup> and relate to the loss of income sustained and the costs

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<sup>78</sup>Winfield & Jolowicz: On Tort, 15th edition, 1998, London, p. 47.

<sup>79</sup>Foreword to the Second Edition of the Guidelines.

<sup>80</sup>Exemplary and nominal damages, but these will not be discussed here.

<sup>81</sup>That is the background to the Swedish compensation for psychological distress in the Tort Liability Act, Chapter 1, Section 3.

<sup>82</sup>Munkman, p. 39.

<sup>83</sup>Winfield & Jolowicz: On Tort, 15th edition, 1998, London, p. 756.

that the plaintiff has incurred in the period since the injury was sustained and up to the time when the compensation is finally decided. For special damages to be compensated they must be alleged and proved<sup>84</sup>. General damages include the remaining part of the compensation, which are financial losses for the future and personal losses. General damages are usually the major part of the awarded compensation. Personal losses are disablement, pain and suffering, and loss of amenities. Compensation for both financial and personal losses is usually awarded as a one-off payment.

The plaintiff is entitled to substantial, and not merely token, damages, for being deprived of the joys of life<sup>85</sup>. It has become recognised that personal loss on the one hand and financial loss on the other are two separate components in an award, and quite distinct in character. It has therefore become necessary to show separately the personal loss, the future financial loss and special damages consisting of financial loss up to the trial<sup>86</sup>. This is because interest is awarded on damages, but the amount of interest awarded varies between the three heads.

## 4.2. Compensation for financial losses

Financial losses include deprivation of earnings and other economic gains that the plaintiff would have had but for the injury, as well as the burden of the extra expenses that have been incurred as a result of the injury. "The basic principle, so far as loss of earnings and out of pocket expenses are concerned, is that the injured person should be placed in the same financial position, so far as can be done by an award of money, as he would have been had the accident not happened"<sup>87</sup>.

That calculation is quite easy to make where the expenses have already occurred, or income has already been lost, up to the date of the trial. The income lost, or the amount spent, can be proved, and if proved will be awarded as special damages<sup>88</sup>.

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<sup>84</sup>Munkman, p. 39.

<sup>85</sup>*H West & Son Ltd v Shephard* [1963] 2 All ER 625.

<sup>86</sup>Munkman, p. 21.

<sup>87</sup>Lord Goddard in *British Transport Commission v Gourley* [1955] 3 All ER 796, at 804.

<sup>88</sup>Munkman, p. 45.

In theory the plaintiff is entitled to the exact amount of his prospective loss. But in the case of future financial losses assessment is not so easy, and it is not possible to calculate the exact loss that will occur, contrary to what is done when calculating special damages. Future losses are therefore awarded as part of the general damages. In practice the court has to make an estimate, taking all the proven facts into account, and the probabilities of the particular case. "He cannot in any real sense be restored, even financially, to his position before the accident. If he had not been injured, he would have had the prospect of earning a continuing income, it may be for many years, but there can be no certainty as to what would have happened. In many cases, the amount of that income may be doubtful, even if he had remained in good health, and there is always the possibility that he might have died or suffered from some incapacity at any time. The loss which he has suffered between the date of the accident and the date of the trial may be certain, but his prospective loss is not. Yet damages must be assessed as a lump sum once and for all, not only in respect of loss accrued before the trial but also in respect of prospective loss. Such loss can only be an estimate, often a very rough estimate, of the present value of his prospective loss"<sup>89</sup>.

The main problem in assessing prospective losses is the fact that the calculation has to be based on factors which are unknown. The amount lost will be unknown, since it is impossible to be certain how much the person would actually have earned, and the duration of the loss is also unknown, since it is impossible to know how long the plaintiff would have been earning an income. A separate factor which normally reduces the total amount of the award is that the plaintiff will receive, all at once, compensation for losses which would be spread over a long period in the future<sup>90</sup>.

#### **4.2.1. Costs**

The plaintiff is entitled to recover all expenses reasonably incurred in the treatment of his injuries<sup>91</sup>. This includes fees for medical advice and surgical operations, the cost of treatment and care in a hospital or nursing home, and the cost of surgical appliances, and of drugs and other prescriptions. Probably the cost of a holiday for convalescence is admissible, if the holiday is reasonably taken, on medical

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<sup>89</sup>Lord Reid in *British Transport Commission v Gourley* [1955] 3 All ER 796, at 804.

<sup>90</sup>Munkman, p. 46.

<sup>91</sup>Munkman, p. 75-76.

advice, as part of the treatment<sup>92</sup>. Also the cost of an accompanying companion will probably be compensated if the victim is unable to travel on his own<sup>93</sup>.

The expenses of treatment in a nursing home or of a convalescence contain an element representing the cost of food. If the victim would have been living in an hotel or other residential establishment, a deduction may be made for the amount which he would normally have had to spend on food, which is an expense that he has now saved<sup>94</sup>. The Court of Appeal has indicated that no deduction would normally be appropriate where the plaintiff has a home of his own, the cost of which continues as usual while he is in a hospital. Any saving that the injured person has made through being maintained wholly or partly at public expense in a hospital, nursing home or other institution is to be set off against loss of earnings<sup>95</sup>.

Where the plaintiff takes advice in good faith from a reputable doctor, the expenses of taking the advice and acting on it are admissible, even if the diagnosis proves to have been mistaken<sup>96</sup>.

One condition for expenses to be compensated is that they are reasonable. In determining whether medical expenses are reasonable, the possibility of using the facilities under the National Health Service Act is to be disregarded<sup>97</sup>. The plaintiff is therefore free to chose to be treated privately and will get the costs for private treatment compensated<sup>98</sup>. Of course if the plaintiff gets free treatment under the National Health system he cannot get compensation for medical costs<sup>99</sup>. It is usual to allow the reasonable cost of transport to and from the hospital or other place where medical treatment is given, and of visits by parents or other relatives or friends<sup>100</sup>.

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<sup>92</sup>Munkman, p. 75.

<sup>93</sup>Munkman, p. 80.

<sup>94</sup>*Shearman v Folland* [1950] 1 All ER 976.

<sup>95</sup>Administration of Justice Act 1982, Section 5.

<sup>96</sup>Munkman, p. 27-28.

<sup>97</sup>Law Reform (Personal Injuries) Act 1948, Section 2(4).

<sup>98</sup>That is as a rule not possible in Sweden, where the plaintiff has a duty to chose the cheapest care adequate for his needs.

<sup>99</sup>*Cunningham v Harrison* [1973] 3 All ER 463.

<sup>100</sup>Munkman, p. 77.

### 4.2.2. Prospective loss

An estimate of prospective loss must be based, in the first instance, on a foundation of solid facts. It is therefore important that evidence should be given to the court of as many facts as possible<sup>101</sup>. Loss of earning is the most common form of prospective loss, but relevant facts should also be proved in other cases of continuing loss, such as the expense of nursing and household assistance. "In assessing the proper figure, the jury have to take into account both the possibilities for good and for bad, striking a fair balance as they see it...To assume for certainty all the most advantageous possibilities and take no account of the disadvantageous is not to strike a fair balance"<sup>102</sup>. The future loss of earnings, spread often over many years ahead and almost certainly at varying rates, has then to be turned into a single capital sum payable at the date of judgement<sup>103</sup>.

Future expenses of nursing or other constant attendance by a wife, relative or friend, are admissible in order to enable the victim to pay a fair compensation to the people who assist him. Relatives' expenses, in connection with care of the plaintiff, are also compensated to the extent that the care is considered beneficial to the plaintiff. Compensation can be awarded even if the service is voluntarily given and without the plaintiff's request<sup>104</sup>. The compensation is usually determined as an amount equal to what the plaintiff would reasonably be expected to pay for such services as the relative has provided. The amount has to be reasonable and usually not exceed the costs of hiring somebody else. The relatives' costs are seen as part of the plaintiff's own costs. An allowance may be given for the cost of specially adapting a house or car to the needs of an invalid, but not for the basic cost of a house or car<sup>105</sup>. The plaintiff can also be compensated for cost of more personal nature, if the injury lead to the break up of the plaintiff's marriage<sup>106</sup>.

### 4.2.3. Loss of income

The loss of income suffered up to the date of the trial is compensated with the exact amount lost in the individual case. In determining future income losses the

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<sup>101</sup>Munkman, p. 46.

<sup>102</sup>Lord Pearce in *Mallet v McMonagle* [1969] 2 All ER 178, at 189.

<sup>103</sup>Munkman, p. 54.

<sup>104</sup>*Schneider v Eisovitch* [1960] All ER 169.

<sup>105</sup>*Moriarty v McCarthy* [1978] 1 WLR 155.

<sup>106</sup>Clerk & Lindsell: On Torts, 17th edition, 1995, London, p. 1440-1441.

courts make an assessment of the circumstances in the individual case. The court gives much importance to the income before and after the injury. The calculated net loss is multiplied by the number of years that the loss will continue. The courts should also take into account unforeseen events which will influence the plaintiff's economic situation, and the advantage of getting the sum as a one-off payment.

When shown that the plaintiff was earning a specific amount at the time of the event, it is presumed that he would continue to earn the same sum. If the victim claims that he would earn more, it is for him to prove it, just as the tortfeasor has to prove that the victim would have earned less. The plaintiff has a duty to limit his loss, and to take any job that can be expected of him<sup>107</sup>.

To calculate the prospective loss is especially difficult when children are injured badly. In practice the courts have usually based the award on what profession the father had at the time of the injury, or the average income in society<sup>108</sup>.

A plaintiff who can no longer do household duties can get compensation for home help.

Damages have traditionally been awarded as a lump sum. It is possible, however, to place the compensation in trust for the victim, who will receive an annuity. Such an arrangement cannot be imposed by a court, but the court can approve a settlement to this effect<sup>109</sup>.

Social security benefits received by the victim for a period of up to five years are to be deducted in their entirety from the amount of compensation awarded. The deducted amount is used to reimburse the Social Security Scheme<sup>110</sup>.

## **4.3. Compensation for personal losses**

### **4.3.1. Background**

Damages are determined for each individual case with previous comparable cases serving as a guide. The Judicial Studies Boards Guidelines are intended to assist

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<sup>107</sup>Munkman, p. 35.

<sup>108</sup>Munkman, p. 67-68.

<sup>109</sup>Weir, Tony: A Casebook on Tort, 8th edition, 1996, London, p. 633.

<sup>110</sup>Winfield & Jolowicz: On Tort, 15th edition, 1998, London, p. 779.

courts by indicating the level of damages which the courts usually give in a particular situation, so that the amounts do not vary too much between different courts. In assessing damages for personal losses the courts take into consideration whether the plaintiff is aware of his condition. That means that plaintiffs with decreased awareness or who is unconscious receive lower awards<sup>111</sup>. Although there are also in England various heads of damages to consider, usually damages for personal losses are determined as a single sum. Compensation for personal losses includes the loss of or impairment to the integrity of the body, pain and suffering, (both physical and mental), loss of the pleasures of life, actual shortening of life, and at least in some cases, mere discomfort and inconveniences<sup>112</sup>.

"If a plaintiff has lost a leg, the court approaches the matter on the basis that he has suffered physical deprivation, no matter what his condition or temperament or state of mind may be. That deprivation may also create future economic loss which is added to the assessment. Past and prospective pain and discomforts increase the assessment. If there is loss of amenity apart from the obvious and normal loss inherent in the deprivation of the limb-if for instance, the plaintiff's main interest was some sport or hobby from which he will in future be debarred, that too increases the assessment...These considerations are not dealt with as separate items but are taken into account by the court in fixing one inclusive sum for general damages"<sup>113</sup>.

#### **4.3.2. Damages for mental shock.**

Damages for pain and suffering can be awarded not only for physical injury but also for such mental injury as shock or other similar injuries that are as a result of the physical injury<sup>114</sup>. Normal shock is not compensated<sup>115</sup>. To qualify for an award of damages, shock must be the cause of some physical, nervous or mental injury or illness.

Injuries brought on by shock get compensated<sup>116</sup>. "It is no longer necessary to consider whether the infliction of what is called mental shock may constitute an

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<sup>111</sup>*H West & Son Ltd v Shephard* [1963] 2 All ER 625.

<sup>112</sup>Munkman, p. 110.

<sup>113</sup>Lord Pearce in *H West & Son Ltd v Shephard* [1963] 2 All ER 625, at 365, 643.

<sup>114</sup>Clerk & Lindsell: *On Torts*, 17th edition, 1995, London, p. 18.

<sup>115</sup>Munkman, p. 116.

<sup>116</sup>Munkman, p. 117.

actionable wrong. The crude view that the law should take cognisance only of physical injury resulting from actual impact has been discarded, and it is now well recognised that an action will lie for injury by shock sustained through the medium of the eye or the ear without direct physical contact. The distinction between mental shock and bodily injury was never a scientific one, for mental shock is presumably in all cases the result, or at least accompanied by, some physical disturbance in the sufferer's system, and a mental shock may have consequences more serious than those resulting from physical impact"<sup>117</sup>.

Already in older case law there are examples of damages given for shock occasioned by a deliberate act. In *Wilkinson v Downton*<sup>118</sup> a man falsely told a woman that her husband was seriously hurt. The woman suffered great mental anguish and was made seriously ill. The court held that the defendant had wilfully done an act calculated to cause harm to the plaintiff and that there was no justification for it. The act was plainly calculated to produce that effect and the result was not too remote. Compensation for mental suffering was given. In *Janvier v Sweeney*<sup>119</sup> a detective tried to get hold of some letters. He visited a woman, the plaintiff, who lived in the house where the letters were, and who was engaged to a German man. The detective alleged to be from Scotland Yard and told her that she was the one they were investigating, due to her connection with a German spy. She suffered a mental shock. The court stated that the statement was meant to cause terror and that the mental shock she suffered could be compensated.

There are also examples of damages given for mental shocks inflicted by somebody being negligent<sup>120</sup>. In such cases it was originally required that the shock was connected with a fear for the plaintiff's own safety. The general rule is that there is no liability for injury caused by shock to people who merely witnessed the accident, and were strangers to the victim, but were not themselves endangered<sup>121</sup>.

But if there is a relationship between the bystander and the victim, the bystander can be compensated for shock. In *Hinz v Berry*<sup>122</sup> the plaintiff was a happily

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<sup>117</sup>Lord Macmillan in *Hay (or Bourhill) v Young* [1942] 2 All ER 396, at 402.

<sup>118</sup>*Wilkinson v Downton* [1895-9] All ER Rep 267.

<sup>119</sup>*Janvier v Sweeney* [1918-19] All ER Rep 1056.

<sup>120</sup>Winfield & Jolowicz: *On Tort*, 15th edition, 1998, London, p. 160.

<sup>121</sup>*Hay (or Bourhill) v Young* [1942] 2 All ER 396.

<sup>122</sup>*Hinz v Berry* [1970] 1 All ER 1074.

married women expecting her fifth child, when she from across the road saw a car hit the stationary van in which her husband and some of their children were. She saw her husband lie dying in the road, and the children, most of them injured, were strewn on the road. She suffered depression as a result of actually witnessing the accident which killed her husband. She was compensated for the nervous shock that she suffered.

The question is whether the relative has to be actually present at the scene of the injury to get compensation for mental shock. In *McLoughlin v O'Brian*<sup>123</sup> the court had to deal with this particular problem. Mrs McLoughlin's husband and three of their children were involved in a car accident, caused by the defendant. One of the children was killed, while the other family members were seriously injured. Mrs McLoughlin, the plaintiff, was at home when the accident happened and was there told of it. She was then taken to a hospital to see the family members, one dead, the others injured and distressed. Due to the accident she suffered nervous shock and claimed compensation from the defendant. The court held that the plaintiff was entitled to recover damages because even though the plaintiff was not at, or near, the scene of the accident, the nervous shock suffered by her was a foreseeable consequence.

It appears that in recent years the courts have expanded the relatives' rights to damages for physical shocks. A case which dealt with two important issues was *Alcock & Others v Chief Constable of South Yorkshire Police*<sup>124</sup>. The defendant was responsible for the policing of a football match at Hillsborough Football Stadium at which, as a result of overcrowding in part of the stadium, 95 people died and many more sustained crushing injuries. The 14 plaintiff's were all related to, or friends of, spectators involved in the disaster. Some of them witnessed the event from other parts of the stadium, or on a television right outside. Others were at home, but witnessed the event live on television. A third group heard about the event and then saw it on recorded television. All the plaintiff's, alleging that what they had seen and heard caused them severe shock, claimed damages. The third group, those that heard about the event and only saw the recorded television pictures, was refused compensation.

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<sup>123</sup>*McLoughlin v O'Brian* [1982] 2 All ER 298.

<sup>124</sup>*Alcock & Others v Chief Constable of South Yorkshire Police* [1991] 4 All ER 907.

The claims by the other two groups went to the House of Lords. The people who had been at the stadium had certainly been present at the scene of the event and fulfilled that criterion for being eligible for compensation. The problem was whether they had a sufficiently close relationship with the victims to be compensated. They were not within the group of relatives that had previously been eligible for compensation, i.e. the relationship of child-parent or husband-wife, but these were only brothers or even more distant relatives, or friends, of the victims. The question was if people not in a parent-child or husband-wife relationship with the victim could be eligible for compensation. The House of Lords held that the relationship with the victim must be sufficiently close, as it is between parent and child, or husband and wife. Other people could be compensated if, in a particular case, the relationship between the two were as close as the relationship between parent and child, or husband and wife. The House of Lords stated that it would be wrong to say that a parent or spouse would always be so close to the victim that he or she could receive compensation, and that no other relationships could. The House held that it should be decided in the individual case, but that there would be a presumption for the first category and against the second. The plaintiffs in this case were not compensated. The second group of plaintiffs were spouses and parents but they had not been at the scene, just seen the event live on television. The House of Lords held that viewing the event on television was not equivalent to being within sight and hearing of the event or its immediate aftermath, and those plaintiffs were denied damages.

In *Frost and Others v Chief Constable of South Yorkshire Police and Others*<sup>125</sup> the House of Lords decided in December 1998 that the police officers who assisted in the rescue at the Hillsborough disaster, and suffered post traumatic stress as a result, were not eligible for damages.

It has also been established in *Attia v British Gas plc*<sup>126</sup> that the right to damages for nervous shock was not limited to witnessing a personal injury but that damages could also be awarded where the plaintiff witnessed the destruction of his property as a result of the defendant's negligence, provided that the plaintiff proved psychiatric damage and provided that the nervous shock was reasonably foreseeable.

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<sup>125</sup>*Frost and Others v Chief Constable of South Yorkshire Police and Others* Law Report, the Times, December 4, 1998.

<sup>126</sup>*Attia v British Gas plc* [1987] 3 All ER 455.

### 4.3.3. Disablement

The concept of "disablement" covers the injury as such, i.e. loss or decreased movement of a limb or decreased movement of the body as a whole<sup>127</sup>. Damages are given for personal injuries irrespective of whether there is a loss of earning capacity or loss of amenities<sup>128</sup>. In principle, the loss of bodily integrity gives a right to damages even if there is no damage at all to the earning capacity nor to the enjoyment of life. For example a man received £500 in compensation for rupture and subsequent removal of the spleen<sup>129</sup>. The courts take into account mainly the type of injury, the extent of the injury, and the period it will last. With multiple injuries the assessment is based on how the injuries together influence the plaintiff's well-being.

### 4.3.4. Pain and suffering

Damages for pain and suffering compensate the plaintiff for physical pain and mental problems. The suffering can be short term, or lifelong. In England this concept is not limited in time as the Swedish concept of pain and suffering, which only relates to the period of acute illness. Life-long suffering is in Sweden compensated as disfigurement and other permanent disadvantages.

Pain and suffering has long been recognised by law as a head for which damages may be given. Prospective as well as past suffering should be compensated. As stated in a leading case: "We have to take into account not only the suffering which he had immediately after the accident but the suffering that he will have throughout his life in future"<sup>130</sup>. To be compensated for mental problems, it is generally required that there is a verifiable illness or injury, and not just normal grief or humiliation<sup>131</sup>. Particularly important is the mental distress a permanent cripple must experience because he is constantly dependent upon the care of other persons, or because his enjoyment of life is cut short<sup>132</sup>. The assessment is based mainly on the period that the pain or troubles last, but also other circumstances can be considered, for example if the person has to go through some very painful operations. In the case of minor injuries from which the plaintiff

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<sup>127</sup>Munkman, p. 113-114.

<sup>128</sup>Munkman, p. 114.

<sup>129</sup>*Forster v Pugh* [1955] CLY 741.

<sup>130</sup>Greer LJ in *Heaps v Perrite Ltd* [1973] 2 All ER 60.

<sup>131</sup>Winfield & Jolowicz: *On Tort*, 15th edition, 1998, London, p. 160.

<sup>132</sup>*H West & Son Ltd v Shephard* [1963] 2 All ER 625, p. 111.

recovers completely, or only receives bruises and abrasion, pain and suffering is the main element in the damages (plus some allowance for temporary interference with the enjoyment of life)<sup>133</sup>.

#### 4.3.5. Loss of amenities

Damages may be awarded for the loss of the pleasures or amenities of life, either permanently, by for example the loss of a leg, or temporarily, as by mere detention in a hospital or in bed for a period<sup>134</sup>. It also includes the plaintiff's possibility of enjoying life, or at least influence his joy of life, for example that he can no longer have a functioning sex life, or that the injuries influence on work, or his spare time activities. Loss of amenities also compensates disfigurements as scars and other cosmetic defects<sup>135</sup>.

Loss of amenities is a distinct element altogether from pain and suffering, or from loss of earning power<sup>136</sup>. As expressed by the House of Lords: "I regard impaired health and vitality not merely as a cause of pain and suffering, but as a loss of a good thing in itself"<sup>137</sup>. The circumstances of the individual case are of importance. For example a minor injured hand could be very serious to a musician, while an ordinary person might be able to continue with his normal life. But even the most ordinary person is entitled to compensation if he is deprived of his little strolls with his dog, his work in the allotment garden, or his visits to the football club<sup>138</sup>. In the case of married persons, injuries which interfere with the normal conduct of life, or prevent sexual relations, may warrant substantial damages<sup>139</sup>. The fact that a woman is prevented from having children is a serious loss. If, because of the injuries, the marriage breaks down and there is divorce or separation, damages are recoverable for the extra costs incurred as a result, for example for child care and home help, but not for the cost of a divorce settlement, which is considered too remote<sup>140</sup>. When estimating damages for the loss of the pleasures of life the plaintiff's age is an important consideration.

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<sup>133</sup>Munkman, p. 115.

<sup>134</sup>Munkman, p. 124.

<sup>135</sup>Munkman, p. 125.

<sup>136</sup>Munkman, p. 124.

<sup>137</sup>Lord Roche in *Roose v Ford* [1937] 3 All ER 359, at 379.

<sup>138</sup>Munkman, p. 124.

<sup>139</sup>Munkman, p. 124-125.

<sup>140</sup>Munkman, p. 125.

Disfigurement also falls under this head. That head has always been regarded as important, especially when a young unmarried woman is disfigured and her prospect of marriage is impaired. This is one of the few types of cases where there is a tendency for damages to be excessive<sup>141</sup>. Disfigurement generally accompanies rather severe injuries, and it is then difficult to determine how much of the damages is due to disfigurement. Sometimes there are no permanent injuries at all, but a mark or a scar is left. That may be compensated, even though it is not really disfiguring<sup>142</sup>. Disfigurement is more serious if it results in the plaintiff risking his career or avoiding social contact<sup>143</sup>.

Loss of leisure due to having to work more to earn the same amount, and loss of an enjoyable or interesting career is in English law also compensated under loss of amenities<sup>144</sup>. Under Swedish law that is compensated as "other inconveniences".

#### **4.3.6. Shortening of life**

Formerly damages were given for the loss of expectation of life, that is for the actual shortening of life by a certain number of years, and damages under this head could be inherited by the estate of an injured person on his death<sup>145</sup>. Damages for expectation of life have now been abolished by the Administration of Justice Act 1982, section 1(1)(a). But if life has been shortened and the injured person is aware of it, the assessment under the head of pain and suffering shall take into account any suffering caused, or likely to be caused, by the awareness<sup>146</sup>.

#### **4.3.7. Fatal injuries**

If the injuries lead to the plaintiff's death, damages are given to compensate financial loss in the form of funeral expenses and loss of support, and personal loss in the form of so-called bereavement damages<sup>147</sup>. Bereavement damages are given as a fixed sum of £7,500, the sum being fixed by statute. Entitled to compensation are surviving spouse, and also parents of unmarried children under 18, but if the child is born outside wedlock only the mother is entitled to

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<sup>141</sup>Munkman, p. 126.

<sup>142</sup>Munkman, p. 127.

<sup>143</sup>Munkman, p. 127.

<sup>144</sup>Munkman, p. 125.

<sup>145</sup>Munkman, p. 125.

<sup>146</sup>Administration of Justice Act 1982, section 1(1)(b).

<sup>147</sup>Clerk & Lindsell: On Torts, 17th edition, 1995, london, p. 19.

compensation. Unlike under Scottish law (where there is so-called loss of society), compensation is not given under English law to surviving children. Damages for pain and suffering and loss of income which the plaintiff has suffered up to the time of his death, are inherited by the estate. Some relatives have, as mentioned, also a right to bereavement damages.

# **5. Comparison of the levels of compensation for personal losses in the two legal systems.**

## **5.1. Outline of the comparison.**

This part of the essay examines different kinds of injuries and tries to establish the amounts which would be awarded today in Sweden and England. It will only deal with compensation for the personal losses, and not with financial losses.

In most of the cases an example of a particular injury in an actual case will be given. In order to be able to make a comparison which is relevant today, the comparison will be based on the assumption that the incident happened recently. All the cases are English, partly because more personal injury cases are dealt with by the courts in England than in Sweden, and partly because the English court cases are reported in greater detail than the Swedish ones. For the purpose of the comparison it will be assumed that the same case had occurred in both countries. There will then be a discussion of what amount would today be awarded for such an injury in England and Sweden respectively. The purpose is to see whether the identical injuries will result in similar or very different sums being awarded.

When the courts or committees make their decisions they have access to experts and have a detailed knowledge of all facts of the case, which the author of the essay has not. The essay is therefore only trying to give a very rough estimate of the levels of awards which might be given.

Despite the fact that the cases presented have actually happened the awards that the courts arrived at in the case will not be given. This is due to the fact that the cases all happened some, or many, years ago. The amounts given for each case will therefore not be found in the actual case, but will have been arrived at by using more up to date data. The English awards will be based on the Second (1994) Edition of the "Guidelines for the assessment of general damages in personal injury cases" which is the most recent one. The tariff used by the Criminal Injuries Compensation Authority has also been examined, but the amounts set out in that tariff are only mentioned if they differ greatly from what

would be awarded by the courts according to the Guidelines. The Swedish awards will be based on the 1998 version of the Road Traffic Injury Commission's tables. The Swedish amounts were thus fixed four years later than the English Guidelines. It has not been possible to include in the assessment of the Swedish compensation an amount for other inconveniences. The Swedish awards would therefore in reality be slightly higher than the ones presented in this essay.

The amounts will be expressed in pounds sterling, with one pound equalling thirteen Swedish kronor.

## **5.2. Injuries involving paralysis**

Injuries involving paralysis are some of the worst kind of injury, since these injuries will affect the plaintiff's entire life, and will, to varying degrees, make the plaintiff dependent on other people. The plaintiff will usually also be fully aware of his situation.

### **5.2.1. Quadriplegia<sup>148</sup>.**

A man, aged 47, was injured in a road accident which left him completely paralysed in all four limbs and the whole body. He was totally dependent on others. His excretion needed to be manually removed. His mind, eyes, ears and tongue were as active as ever.

England

The amount given in England for quadriplegia under the Guidelines is between £105,000 to £125,000. However, in a recent case the High Court awarded a young man over £1 million for quadriplegia, in spite of the fact that the compensation was reduced by 40% due to contributory negligence<sup>149</sup>. Although the Court of Appeal quashed the ruling and held that the man was not entitled to any compensation due to the fact that he was entirely responsible for the event, this High Court judgement could indicate that today the courts might be prepared to award amounts higher than those set out in the Guidelines. It should be noted that the compensation for quadriplegia is set at £250,000 in the tariff under the Criminal Injuries Compensation Scheme.

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<sup>148</sup>Total paralysis with consciousness. *Cunningham v Harrison* [1973] 3 All ER 463.

<sup>149</sup>*Ratcliff v McConnell and Another* Law Reports, the Times, December 3, 1998.

For the purpose of the comparison in this essay the level of compensation set out in the Guidelines will be used. The level of the award should take into consideration the extent of any capacity of movement that is left, pain, effects on other senses, depression, and age and life expectancy. The 47 year old man could at least communicate and had no pain and seemed not to suffer depression. The award in this case might fall somewhere in the middle of the bracket. It is estimated that he would receive £115,000.

#### Sweden

It is necessary to determine firstly the period of acute illness, i.e. until the victim has reached the condition that he will have to live with for the rest of his life. In this case there is no information on how long that period will be, but it is assumed that he had to spend nine months in hospital and four months convalescing. The injury is very serious, and for the first six months he will receive 4,500 SEK per month, i.e. 27,000 SEK. For the remaining three months of his stay in hospital he will receive 3,300 SEK per month, that is 9,900 SEK. He would receive 2,000 SEK per month for his convalescence after leaving hospital, that is 8,000 SEK. For the period of acute illness he would receive 44,900 SEK, corresponding to £3,454, as compensation for pain and suffering.

As regards the life long effects of his injury his medical invalidity has to be established. Total paralysis from below the neck is considered as a 97% invalidity. At his age (47) this would give him 540,900 SEK, corresponding to £41,608, as compensation for disfigurement and other permanent disadvantages.

#### Comparison

Altogether the plaintiff would in Sweden get £45,062 as compensation for injuries that left him a quadriplegia. This award should be compared to £115,000 that he would have received in England under the Guidelines, and £250,000 under the Criminal Injuries Compensation Scheme.

### **5.2.2. Paraplegia 150.**

The plaintiff, a boy aged 16 at the time of the accident, was injured when riding his motorcycle. The boy fell down an eight foot drop at the end of the road, and was permanently paralysed in his lower limbs and the lower part of his trunk. He

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<sup>150</sup>Paralysis below the waist. *Walker v John McLean & Son Ltd* [1979] 2 All ER 965.

spent six months in hospital before returning home to the care of his parents. Despite his paraplegia he was able to live his own life, finish school, get a job and have a social life. But he was impotent and there was a risk of kidney damages in the future. He needed to live in a suitably adapted home, and needed somebody to live with him, even though he did not need constant nursing.

#### England

Under the Guidelines the amount awarded in England for paraplegia is between £80,000 and £95,000, whereas the tariff under the Criminal Injuries Compensation Scheme is £175,000.

In the example above it is assumed that the level of the awarded will be that of the Guidelines. The compensation would therefore be between £80,000 and £90,000. The level of the award should take into consideration pain, depression, age and life expectancy. The victim was a teenager, who would have to spend his entire life in a wheelchair, but he had shown that he would not let it ruin his life. It is assumed that the plaintiff would get £90,000.

Sweden

It is assumed that the period of acute illness lasts until he was able to return home, i.e. six months. The injury was serious and he would get 4,500 SEK per month in hospital, or a total of 27,000 SEK. The amount for pain and suffering corresponds to £2,077.

His invalidity would in this case be considered at 87%. He was 16 years old when the accident happened. He will receive 563,000 SEK, or £43,308, for disfigurement and other permanent disadvantages.

Comparison

Altogether the plaintiff would in Sweden get £45,385 as compensation for an injury that left him a paraplegic. This should be compared to £90,000 which he would receive in England under the Guidelines, and £175,000 under the Criminal Injuries Compensation Scheme.

## **5.3. Injuries affecting the sight.**

### **5.3.1. Total blindness<sup>151</sup>.**

A man, aged 36, was seriously injured in both eyes causing permanent and total blindness. He was in hospital for four months and underwent four operations. He was unable to learn Braille. The eyes were disfigured, but the skin around was not. He would occasionally suffer pain and discomfort in the eyes.

England

The amount given for total blindness is £90,000.

Sweden

The compensation for total blindness is fixed at 620,000 SEK, corresponding to £47,692. But being 36 he would only get 89% of that amount, that is £42,446. He would also get some compensation for disfigurement. Since the disfigurement was not clearly prominent the compensation would only be between 10,947 SEK and 16,465 SEK. As the disfigurement is only slight, the lower amount seems appropriate. In addition, compensation should be given for pain and suffering. It is presumed that his acute illness lasted only the four months that he stayed in

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<sup>151</sup>*Singh v Sherwood* [1982] CLY 820.

hospital. He was seriously injured and would receive 4,500 SEK per month for that period. That would give him 18,000 SEK for pain and suffering, corresponding to £1,385.

#### Comparison

The man in question would in Sweden get £44,673 for complete blindness, compared to England where he would receive £90,000.

### **5.3.2. Total loss of sight in one eye<sup>152</sup>.**

A girl of 14 was struck in her right eye resulting in blindness of that eye. There was no cosmetic disability.

#### England

An injury causing blindness in one eye would in England result in compensation of between £20,000 and £22,500. She is very young, and her planned future in the army is gone, but she is able to read, and there is no cosmetic disability. For these reasons, compensation to this girl would fall somewhere in the middle of the bracket. It is assumed that she will get £21,300.

#### Sweden

It is assumed that the girl had to spend four months in hospital. She could after that get back to her new life. Lost sight in one eye does not fall under serious injuries when calculating pain and suffering. She would get 3,300 SEK per month in hospital, i.e. 13,200 SEK for pain and suffering, corresponding to £1,015. Her medical disability is only considered to be 14%. At that level the normal compensation would be 42,400 SEK, but due to her youth she would get an extra 10%, i.e. 46,640 SEK (£3,588) for disfigurement and other permanent disadvantages.

#### Comparison

The girl would recover a total sum of £4,603 in Sweden to compensate her for loss of sight in one eye, whereas in England she would have had £21,300.

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<sup>152</sup>*Cole* [1987] CLY 1189. This case was decided by the Criminal Injuries Compensation Board.

## 5.4. Injuries affecting hearing.

The problem with hearing injuries are that they are usually the result of a long slow process of exposure to loud noises, and the injury gradually get worse. Hearing injuries do not necessarily lead to complete loss of hearing. Due to the gradual process of hearing injuries, no case will be presented.

In England total deafness would give an award of between £35,000 and £42,500. In Sweden the medical invalidity for complete deafness is considered to be 60%, which would give a maximum compensation of 298,500 SEK, or £22,962. That amount would decrease in relation to the plaintiff's age and could increase if there was any amount awarded for pain and suffering.

If there is complete loss of hearing in only one ear the sum given will be lower. In England the awards would be between £13,500 and £18,500. Compensation towards the higher end of the scale will be given if there are other problems, such as tinnitus<sup>153</sup> or headache. In Sweden total deafness of one ear has a medical invalidity of 15%, compared to 60% for complete deafness. This would give a maximum compensation in Sweden of 46,200 SEK, or £3,554. If there is a major problem of tinnitus, the invalidity is 25% and the compensation is a maximum of 87,900 SEK (£6,762).

## 5.5. Injuries affecting taste and smell.

Injuries affecting taste and smell are often caused by head injuries and compensation for such injuries would therefore be part of a bigger award, which would include compensation for other injuries.

England

Compensation for total loss of both taste and smell would be £16,000. Compensation for loss of taste only would be £8,000 to £10,500. For loss of smell only, the compensation would be slightly higher, between £10,500 and £13,500, because in almost all cases of loss of smell there is some impairment of taste.

Sweden

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<sup>153</sup>Tinnitus is a sensation of ringing in the ears.

As is the case for complete blindness, the amounts awarded for injuries affecting taste and smell are fixed. The sums should be related to age. For loss of smell and taste an award of 64,000 SEK, or £4,923, is given for a 25 year old. For loss of taste only 14,000 SEK, (£1,077) is given, and the sum for loss of smell only is 51,000 SEK (£3,923). If the person is older, the amount is reduced accordingly, so a 40 year old would only get 85% and a 90 year old only 10% of those amounts.

## **5.6. Neck injuries**

Only the type of injury commonly called "whiplash" will be dealt with. The seriousness of that type of injury can vary. In England whiplash injuries of the more serious type, causing serious restriction of movement, permanent or recurring pain, stiffness or discomfort or potential need for further surgery, can achieve an award of £5,500 to £10,000, while minor injuries would get up to £3,000. In Sweden a whiplash injury is given a medical invalidity of 30%, but in the table it is stated that in severe cases this can be increased. A "normal" whiplash injury would give a maximum award of 111,300 SEK, corresponding to £8,562, which would be quite high when comparing it to England.

## **5.7. Back injuries**

Very severe back injuries have been dealt with earlier as injuries causing paralysis. This section deals with back injuries of the less severe kind. In England very few such back injuries receive an award over £20,000. The majority of serious back injuries would receive an award of between £11,500 to £16,000. In Sweden back injuries that cause severe pain and therefore cause serious limitation of movement can result in a maximum award of 111,300 SEK, that is £8,562.

Moderate back injuries would in England result in compensation of £5,000 to £11,500. In Sweden back injuries that cause moderate pain and limitation of movement has an invalidity of 15% and would be compensated with a maximum of 46,200 SEK, that is £3,554.

Minor back injuries would in England get an award up to £5,000, while in Sweden it has a disability of 5% which results in a compensation of some 13,900 SEK (£1,069).

## **5.8. Injuries affecting arms.**

### **5.8.1. Loss of both arms.**

Loss of both arms is considered to be one of the worst injuries due to the fact that the person can not do anything on his own, but will need help to open doors, to turn the pages in a book etc. A person without arms is considered more helpless than a person without legs.

There are no recent court cases in England dealing with the loss of both arms. However the award for such an injury would under the Guidelines be between £85,000 and £95,000, i.e. the same level as for injuries causing paraplegia<sup>154</sup>.

In Sweden such an injury would be considered as only a 77% invalidity, and that only if both arms are completely lost. That would mean that the maximum compensation given for the complete loss of both arms is 451,600 SEK (£34,738). In addition, there would be an amount of 180,000 SEK (£13,846) to compensate for the disfigurement resulting from having the arms amputated, which would increase the sum given for disfigurement and permanent disadvantages. There would also be some compensation for pain and suffering during the period of acute illness.

### **5.8.2. Loss of one arm<sup>155</sup>.**

A man, aged 47 and right handed, got his right hand caught in a machine resulting in a traumatic amputation of the arm below the elbow. He was in hospital for three and a half weeks, and required surgical amputation above the elbow to make it possible to fit on a prosthesis. He was unfit to work for fifteen months. He had continuing tingling and phantom limb sensation in the stump.

England

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<sup>154</sup>Under the Criminal Injuries Compensation Scheme the compensation for the loss of both arms is £100,000, i.e virtually the same as under the Guidelines. However, under the Guidelines compensation for paraplegia is the same as for loss of both arms (£80,000 to £95,000), whereas compensation for paraplegia under the Criminal Injuries Compensation Scheme is £175,000.

<sup>155</sup>*Hinds v Latter & Co* [1986] CLY 1025.

The amount of compensation given would depend firstly on whether the amputation was above or below the elbow. A below the elbow amputation would give £37,500 to £42,500. In this case there was an amputation above the elbow. Had the amputation been at the shoulder the compensation would not have been below £52,500. In this case the amputation was above the elbow, but not at the shoulder, which would give an award of between £42,500 and £47,500. Where within the bracket the amount would fall would depend mainly on whether it is the dominant arm, as in this case, and the intensity of any phantom pains, which do not seem to be too great in this case. It is assumed that he would be awarded £46,800.

#### Sweden

The period of acute illness is the fifteen months he was off work. For almost a month he was in hospital with a serious injury which will give him 4,500 SEK. The remaining fourteen months he was treated at home. For the first twelve months after leaving hospital he would be given 2,000 SEK a month, i.e. 24,000 SEK. For the last two months he would receive 1,100 SEK per month, that is 2,200 SEK. That would give him 30,700 SEK (£2,362) in compensation for pain and suffering.

He would also have to live with his injury for the rest of his life. The medical invalidity for an amputation above the elbow would be 45%. At 47 years of age it would give him 151,200 SEK. He will also get 62,400 SEK for the disfigurement caused by the amputation. It gives him a total amount for disfigurement and other permanent disadvantages of 213,600 SEK, that is £16,431.

#### Comparison

In Sweden he would get, for loss of one arm, a compensation of £18,793, compared to £46,800 in England.

### **5.9. Shoulder injuries.**

Shoulder injuries seem to attract modest awards. In England a serious shoulder injury would give £5,250 to £8,000, whereas a minor injury, with an almost complete recovery within a year, would result in an award of £2,000 to £3,250.

In Sweden, if the movement is limited up to 45 degrees, the medical invalidity would be 20%. That would lead to a maximum compensation of 66,200 SEK, or £5,092. If the movement was limited up to 90 degrees, the invalidity would be 10%, resulting in a maximum compensation of 27,800 SEK, or £2,138.

## **5.10. Injuries affecting hands and fingers.**

### **5.10.1 Loss of both hands**

As in the case of losing both arms, loss of both hands is a very serious disability, since it will leave the person in a state of considerable helplessness.

#### England

There has been no recent case concerning loss of both hands, but in England the award would be between £52,500 and £70,000<sup>156</sup>. The top of the bracket is applicable if no prosthesis can be used.

#### Sweden

If both hands are lost the medical invalidity in Sweden is 65%, compared to 77% if both arms are lost. A 65% invalidity gives a maximum compensation of 339,300 SEK, which corresponds to £26,100. In addition the victim would get compensation for the disfigurement caused by the amputation of 140,000 SEK (£10,769). There will also be some £1,000 as compensation for pain and suffering.

#### Comparison

The total amount of compensation in Sweden will still be less than £40,000, compared with a minimum in England of £52,500.

### **5.10.2. Loss of one hand<sup>157</sup>.**

A man, aged 47 and right handed, caught his right hand in an extractor fan at work. He sustained severe crushing of the right hand, which ultimately was amputated, leaving a seven inch stump below the elbow. He sometimes suffered

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<sup>156</sup>Under the Criminal Injuries Compensation Scheme the compensation would be £100,000.

<sup>157</sup>*Evans v British Steel Corporation* December 18, 1970, unreported (see Kemp & Kemp, Vol 2, 9-727).

from phantom limb sensation. He returned to work after five months, but was much less effective. His employers were willing to keep him on as long as he wished, but he would have difficulty in finding another job, if it ever became necessary.

#### England

Total loss of one hand would in England lead to awards of between £37,500 and £42,500. The upper end of the bracket is indicated to be used where the hand lost was the dominant one, as in this case. For this victim the award may be in the region of £41,500.

#### Sweden

The man's period of acute illness lasted the five months that he was of work. Of those five months it is assumed that he spent one month in hospital. He had suffered a serious injury and would get 4,500 SEK (£346) for the month he spent in hospital. For the remaining four months he would get 2,000 SEK a month, or 8,000 SEK (£615). For pain and suffering during the five months of acute illness he would therefore get a total of £961.

The loss of one hand is given a medical invalidity of 37% in Sweden. That gives him, as a 47 year old, 114,900 SEK (£8,838). In addition he would get 54,600 SEK (£4,200) to compensate for the disfigurement caused by having a hand amputated. For disfigurement and other permanent disadvantages he would get 169,500 SEK (£13,038).

#### Comparison

In Sweden he would get £13,999 compensation for losing one hand. This is to be compared to £41,500 in England.

### **5.10.3. Loss of fingers.**

The main point of interest in respect of loss of fingers is how an injury affects the hand as a whole. When a finger is lost there is also some degree of disfigurement. There is a great span in the awards given, from injuries falling just short of losing the whole hand to loss of one little finger.

#### England

If many fingers are lost, leaving the hand of little use and with an exceedingly weak grip, the award could be between £25,000 and £35,000. But if the hand has suffered a serious injury, but is still of some use, even if its left clawed and clumsy, or with much diminished grip and deformed, the award given will not exceed £25,000.

For injuries consisting of loss of one finger, the awards given will vary greatly depending on which finger was lost. By far the highest award for loss of one finger is given for the loss of a thumb, which is the most important finger, and such a loss will achieve an award of between £15,000 and £22,500. That is to be compared with awards not exceeding £8,000 for the total loss of an index finger, and awards of £6,500 for the total loss of middle finger, and the sum of between £3,500 and £5,000 for the amputation of the little finger. If there is only partial loss of a finger, the sum awarded will be lower. If more than one finger is lost, the award will be higher. For example loss of both the ring finger and the little finger will result in an award of £9,000.

#### Sweden

If the injury consists of the loss of all fingers, this would in Sweden have a medical invalidity of 34%, which would give a maximum award of 131,400 SEK (£10,108). If the thumb is intact the invalidity goes down to 31%, and the award in Sweden could be 116,200 SEK (£8,938).

The level of compensation for the loss of one finger will also in Sweden depend on which finger was lost. Loss of the thumb gives the highest medical invalidity, 19%, which results in a maximum award of 62,100 SEK (£4,777). In addition there will be 12,000 SEK, corresponding to £923, as compensation for the disfigurement caused by having the thumb amputated. In Sweden the maximum compensation for losing a thumb would be £5,700. The awards in Sweden then go drastically down for loss of other fingers. Loss of any of the other four fingers results in a compensation of 10,000 SEK (£769) as compensation for the disfigurement. In addition there is compensation for the invalidity caused. The invalidity for loss of the index or middle finger is 7%, which gives 19,460 SEK (£1,497), and for the ring or little finger 4%, which gives 11,120 SEK (£855). That means that the total sum for losing a finger is £5,700 for a thumb, £2,266 for the index or middle finger, and £1,624 for the ring or little finger. If a finger is only partially lost, the sum awarded will be lower, and if more than one finger is lost the award will be higher.

## Comparison

If in Sweden all fingers are lost the compensation would be £10,108. This is to be compared with £25,000 given in England when there is still some use of the hand. The compensation for loss of a thumb is in Sweden £5,700, compared to a minimum of £15,000 in England. For loss of the index finger £2,266 is awarded in Sweden compared to a maximum of £8,000 in England. For the loss of a middle finger the compensation in Sweden would be £2,266, compared to £6,500 in England. Compensation for the loss of a little finger is in Sweden £1,624, compared to a minimum of £3,500 in England.

## **5.11. Injuries affecting legs.**

### **5.11.1. Loss of both legs<sup>158</sup>.**

A man, aged 31, married with two sons and very active, sustained very severe injuries to both legs. On admission to hospital he had to be resuscitated. His right leg was amputated at mid-thigh level. Unsuccessful attempts were made to save his left leg. After seven weeks his left leg was amputated below the knee. He then had to undergo skin grafting. He was detained in hospital initially for two months but after being discharged he had to return for treatment. After being discharged he had to spend nine months in a wheelchair, before being fitted with prosthesis. He was of a robust personality with an independent nature and doing the best of his disability, but his handicap was grave. He walked well, but slowly, with the aid of a stick. He also had difficulty with many everyday tasks. His ability to take part in recreational activities improved, but he was still very restricted. There might be a need for further surgery in the future. He had no pain or phantom limb sensation. His prospect of getting a job was bleak.

## England

The award given for loss of both legs depends on whether the legs are lost above the knee, in which case the award would be between £95,000 and £105,000, or if the legs are amputated below the knee, in which case the award would be between £75,000 and £95,000. In this case one leg was amputated above the knee and the other below. It is estimated therefore that the plaintiff in this case would get £95,000.

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<sup>158</sup>*Jones v Newton* [1981] CLY 649.

Sweden

The period of acute illness can in this case be said to end when he had been fitted with prosthesis. He was seriously injured and would get 4,500 SEK per month that he spent in hospital. He was in hospital for two months which would give him 9,000 SEK (£692). He then spent another nine months out of hospital and for that time he would get 2,000 SEK a month or 18,000 SEK (£1,385). For pain and suffering he would thus get a total of £2,077.

He would also get compensation for the life-long effects of his injury. The medical invalidity of losing both legs is 65%. At 31 years of age it would give him 319,000 SEK, plus compensation for the disfigurement caused of 131,600 SEK. This would give him a total of 450,600 SEK (£34,662) in compensation for disfigurement and other permanent disadvantages.

Comparison

Altogether he would in Sweden get £36,739 as compensation for losing both legs, while in England he would get £95,000.

### **5.11.2. Loss of one leg<sup>159</sup>.**

A man, aged 39 at the time of the accident, was injured when he was struck by a motorcycle which was being pursued by the police. He suffered a traumatic amputation of the left leg below the knee. He was conscious throughout and in severe pain. After being taken to hospital he underwent a number of operations and was fitted with a prosthesis. He remained in hospital for four weeks. The victim was left with inter alia tenderness of the stump, phantom symptoms, deformity of the knee and pain in both knees. Before the accident he had been an active man. Thereafter he could only carry out his hobbies at low levels, and his social life was greatly affected. His employer was very accommodating, but he was losing income due to not being able to work overtime.

England

The award given in England for loss of one leg will depend on whether the leg is lost above or below the knee. If the leg is lost above the knee the award would be £37,500 to £50,000. In this case the amputation was below the knee. The

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<sup>159</sup>*Davis v Cork* [1995] CLY 1740.

award would then be in the region of £35,000 to £45,000. A straightforward amputation without complications would justify an award at the bottom of that bracket. Towards the top of the bracket would fall traumatic amputation in a horrendous accident, where the injured person remained fully conscious or numerous operations were made in an attempt to save the leg resulting in an amputation taking place years after the event. In this case the leg was amputated at the site of the accident and the man remained fully conscious. He should therefore get a compensation towards the higher end of the bracket. It is estimated that the victim in this case would get £42,000.

#### Sweden

The man would firstly get compensation for the period of acute illness. He stayed in hospital for four weeks. It is assumed that he needed another four months before returning to work. For the month he spent in hospital he would get 4,500 SEK. For the remaining four months he would receive 2,000 SEK per month, i.e. 8,000 SEK. For pain and suffering he would thus get a total of 12,500 SEK (£962).

The loss of a leg below the knee has a medical invalidity of 19%, compared to 38% if a leg is amputated at the hip. At the age of 39 that would give the victim 53,400 SEK. He would also get a sum of 60,000 SEK as compensation for the disfigurement. As compensation for disfigurement and other permanent disadvantages he will get a total of 113,400 SEK (£8,723).

#### Comparison

Altogether he would in Sweden get £9,685 as compensation for losing a leg, whereas in England he would get £42,000.

## 5.12. Foot injuries.

### 5.12.1. Loss of both feet<sup>160</sup>.

A man, aged 47, got his feet crushed at work, with the result that both feet were amputated above the ankle. He was in hospital for just over 19 weeks. He was fitted with prosthesis. He walked with an unnatural gait and only for short distances. He had difficulty with stairs and on uneven or slippery surfaces. He had to give up some hobbies, and could only drive an automatic car. His employers continued paying him and he was given another position with them which suited his disability better.

#### England

The award given in England for loss of both feet is between £60,000 and £65,000. This man seems to be coping very well in the circumstances. It is estimated that he would get an award of £62,000.

#### Sweden

The man's acute illness must have lasted longer than the 19 weeks spent in hospital. It is assumed that he needed another four months to get used to his injury before being able to get back to work. For the little more than 19 weeks (5½ months) he spent in hospital he would get 4,500 SEK per month, or 24,750 SEK. For the remaining four months he would get 2,000 SEK a month, i.e. 8,000 SEK. For pain and suffering he would receive a total of 32,750 SEK (£2,519).

The medical invalidity of having both feet amputated is not given in the table, but is given for loss of part of the lower legs which happened here. The invalidity is then 23%. At 47 years of age this would give him 61,600 SEK. In addition he would get 93,600 SEK in compensation for the disfigurement caused. It gives him a total compensation for disfigurement and other permanent disadvantages of 155,200 SEK (£11,938).

#### Comparison

Altogether he would in Sweden get £14,457 in compensation for losing both feet, compared to the £62,000 in England.

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<sup>160</sup>*Pavilt v Thames Board Mills* 21 July 1975, unauthenticated (see Kemp & Kemp, Vol 2, 10-901).

### **5.12.2. Loss of one foot.**

In England loss of one foot would lead to an award similar to one for amputation of the leg below the knee. A loss of one foot would result in a compensation of £32,500 to £42,500.

In Sweden the medical invalidity of one amputated foot is only 9%, which would give a compensation of 25,020 SEK. In addition there would be compensation for the disfigurement caused of 50,000 SEK. That would result in a total compensation for disfigurement and other permanent disadvantages of £5,771. There would also be compensation for pain and suffering. It is assumed that he would be awarded the same amount as in the example above, that is £2,519.

#### Comparison

The total compensation in Sweden would be £8,290 for a person losing a foot. That is only a fourth of the sum that would be given in England for the same kind of injury. There the minimum compensation is £32,500.

### **5.13. Toe injuries.**

If all toes are amputated, the award in England would be between £15,000 and £22,500. Amputation of the big toe gives an award in the region of £12,500.

The loss of a big toe is in Sweden given a 3% medical invalidity, and a maximum compensation of 8,340 SEK. In addition a maximum sum of 7,000 SEK (£538) is awarded as compensation for the disfigurement. The total amount given for loss of a big toe is in Sweden 15,340 SEK (£1,180). The disfigurement resulting from the amputation of any other toe is only worth 5,000 SEK (£385).

### **5.14. Injuries to internal organs.**

#### **5.14.1. Reproductive system**

The level of compensation for injuries to the reproductive system is dependent on the sex and age of the plaintiff, but also on whether the plaintiff already has children.

## England

The highest award is given to young people who have not yet had children. In England the highest award is given to a woman if the injury results in infertility with associated depression and some anxiety and pain and scarring, in which case there would be an award of between £45,000 and £60,000. In the case of a young man suffering total impotence and loss of sexual functions the award will be in the region of £55,000. But in an uncomplicated case of infertility, when the victim is a young man without children, the award is between £22,500 and £27,000, compared to £10,000 to £12,500 for a man who already has a family, but who might have intended to have more children. In the case of women who have already got children, the award is between £7,500 and £15,000. Where the women would not have had children anyway, for example due to age, the award is between £2,500 and £5,000. For a failed sterilisation that led to an unwanted pregnancy the award is between £7,500 and £10,000.

## Sweden

The medical invalidity for sterility is 30% for both men and women until the age of 50. As for most other injuries, the level of compensation is related to age, and the sum will go down with the age of the injured person. In this case a 25 year old would get 111,300 SEK (£8,562). A 30 year old would get £8,134, a 40 year old would get £7,278, and a 50 year old would only get £6,422. These figures apply to both men and women. But after the age of 50 this changes. The medical invalidity for women is then 0%, and they get no compensation, except possibly compensation for pain and suffering. But for a man over 50, but under 65, sterilisation has a medical invalidity of 15%. This means that a man who is over 50 gets up to 34,700 SEK (£2,670). A man who is 60 gets £2,046, and a 65 year old man £1,731. Men over 65 still are considered to have a 5% invalidity, i.e. a maximum of 6,811 SEK (£524).

### **5.14.2. Spleen**

Damage to the spleen is a very common injury, resulting for example from motor cycle accidents, the classic "handlebar injury". In England the award is between £2,000 and £3,500 for a normal removal of the spleen. This sum can be increased, to more than twice that sum, if there is a continuing risk of infection. In Sweden the compensation for loss of a spleen is set at 25,000 SEK (£1,923) and this independently of the person's age. In addition some compensation for scarring

will be given, between £192 and £569, or more if the scars are more than prominent.

## 6. Conclusions

This essay has examined two legal systems which are very different. The Swedish system is based on statutes and most decisions regarding compensation for personal injuries are made not by the courts but by other bodies, such as the Road Traffic Injury Commission. On the other hand the English system is based on case law, and the decisions in personal injury cases are normally rendered by the courts. Yet there are also similarities between the systems. There are also in England committees, even if not to the same extent as in Sweden.

Both legal systems have faced the problem of how to assess personal losses in monetary terms. In both countries attempts have been made to deal with this problem by the adoption of tables in which a specific amount is awarded for each type of personal loss. Such tables have been elaborated in order to contribute to a uniformity in the levels of compensation for personal losses. It appears that the Swedish courts to a very large extent follow the tables adopted by the Road Traffic Injury Commission, whereas the English courts feel free to disregard the Guidelines for the assessment of general damages in personal injury cases.

The two legal systems use different concepts and terms for the heads of damages for personal injuries which are compensated. A superficial examination seems to indicate that the two systems give compensation for very different losses, but a detailed examination shows that this is not the case. The compensation given for financial losses are the same, namely compensation for costs and for loss of income for the past and the future, and the financial losses can easily be compensated in monetary terms. The heads of compensation for personal losses are expressed in very different terms, but in fact compensation is awarded for the same types of losses.

For example, the head "pain and suffering" exists in both legal systems, but the compensation actually given under this head is not awarded for the same types of damage. The Swedish concept of "pain and suffering" covers only the period of acute illness, while the English concept of "pain and suffering" covers an indefinite period. However, in Sweden there is also the head "disfigurement and other permanent disadvantages" which does cover the life-long effects of the injuries.

Even though the same types of personal losses are compensated in the two legal systems, the levels of compensation awarded for personal losses vary greatly between them. It is recognised that the essay is based on a limited material from both systems, but the study has shown that generally the level of compensation for personal losses is considerably higher in England than in Sweden. The examples given in the essay seem to indicate that the amounts awarded in England are at least double the amounts awarded in Sweden for similar injuries, sometimes four times higher, or more. There are, however, a few examples in the essay where the difference between the levels of compensation is fairly small.

As mentioned in the introduction it appears to be a common perception that awards in Sweden for personal injuries are very low in comparison with awards in other countries. The cases used as examples in this essay indicate that this common perception is correct as regards compensation levels in Sweden and England.

An interesting question is why the levels in compensation for personal losses differ to such an extent between the two countries. Since the standard of living is generally higher in Sweden than in England, it could perhaps have been expected that the compensation levels would have been higher in Sweden. One reason for the difference in levels might be that the English legal system by tradition is more focused on the protection of the individual, whereas in Sweden traditionally this aspect is given a somewhat less importance. Another reason could be that it is assumed in Sweden that the Social Security System gives a basic protection for anyone who has suffered an injury and that the courts in England may disregard this aspect. English judges may also be more inclined to develop the law than their Swedish colleagues. It appears, however, that these factors do not explain the great difference in compensation levels.

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