”The temporal dimension of tort law”

1. Introduction

The project aims at an analysis of how the temporal dimension affects questions of compensation. By scrutinizing the interplay between compensation rules and notions of chronology and temporal dimensions one may improve our ability to draw the line between loss that qualifies for compensation and loss that rightly should not be compensated.

Tort law is about restoring justice whenever A has harmed B. There is a complicated set of rules governing the empire of tort law justice. Every single element of the set of rules refers without exception to a point in a chronological line that may be drawn from the point in time where the first risk of damage arose until the last restoration in money has been fulfilled. The project is about this chronological line and the corresponding rules. By taking the chronological line as a point of departure one opens the possibility of a new perspective to tort law problems. Nuances that traditionally are hidden by the complications of the normative structure of tort law may come to the fore solely because the chronological perspective sheds light into the dark corners of the tort law system. Moreover, by highlighting the temporal dimensions of tort law one may be able to construct a comprehensive theoretical system that has both heuristic and epistemic value.

Following this idea, we will try to pinpoint the normative consequenses of all the chronological milestones. The interplay between plaintiff and defendant may be scrutinized by looking at one chronological step at the time. As chronological steps one may highlight the following events:

The risk arises
The risk is discovered by the defendant or his representative
The risk culminates into primary damage
The risk of secondary damage arises
The risk of secondary damage is discovered defendant or his representative
The risk of secondary damage culminates into secondary damage
The damage is definitive/the damage can not be fixed.
A third party pays for damage initially
The third party claims subrogation from defendant
The defendant pays the third party

Also other events within the chronological line from creation of risk to the final payment is conceivable.

In addition to the possible fruits of this main idea of tort law chronology, some other aspects of tort law may be elaborated. In general there are good reasons for focusing on the concept of damage in light of modern developments. The increased level of civilisation, the increased level of commercialisation and the increased general level of personal well-being in the modern society raises a number of questions regarding the borderlines of the concept of damage, a core requisite for compensation. The mentioned development correlates with an increased internationalisation of tort law. Norwegian tort law faces and increasing integration of European tort law, not only because of the EEA agreement but also as a result of a very exciting period in the development of western tort law. For the first time one has developed

comprehensive soft law- principles that reflects a common core of European tort law.[1] There is both academically and practical need for a Norwegian scientific effort in order to analyse which impact this development has or should have on Norwegian law. This is particularly important in view of the fact that Norway has been left out of the working groups that have been the greatest contributors to the elements of what one might call "a Common European Tort Law".[2] There is a need for a modernisation of the concept of damage within Norwegian tort law.

Given a future scenario dominated by the above mentioned factors, we have chosen to embark on a research project that elaborates five topics of discussion within the borderline zone of the concept of damage. These five topics have a connection with and will be studied in the light of a sixth over all approach which binds the whole project together; namely the temporal dimension of tort law.

The five topics are
1) Interests on the border between economical and non-economical interests
2) Preventive expenses
3) Frustrated expenses
4) The principle of difference as a method for assessing damages
5) The problem of "passing on"
6) The over-all subject: A study of the temporal dimension in tort law with a special view on the concept of damage as a key requisite for compensation.

Below the five areas of research will be further explained (2-6), as well as the over-all subject (7).

The project will apply a traditional legal dogmatic method. But our approach will feature a substantial element of comparative research. As for the over all study mentioned in no. 6 above, one will make use of certain philosophical works that greatly have influenced the legal thinking with regard to causation.

2. The border between economic and non-economic interests[3]

The concept of damage recognises that infringement of economical interests qualifies for compensation. It is a more doubtful question whether interests connected to recreation or other conditions of well-being will get compensated as long as they can not be transformed into a defined economical value. The leading opinion has under Norwegian law been that non-economical interests only will be compensated when there is a legal basis for this in statutory law. This opinion has, however, to a certain extent been challenged. Firstly, scholars have suggested that this solution is inadequate when it comes to infringement of immaterial legal positions such as copyrights.[4]

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[1] I refer to Principles of European Tort Law, presented in Vienna May 2005 as well as principles of European Patrimonial Law, a part of the work on a European civil Code performed by the von Bar - group and initiated by the European Union.

[2] In addition to the sets of principles mentioned in footnote no. 1 one could mention the great comparative opus Christian von Bar, A Common European Tort law I & II, Oxford 1998/2000.

[3] In 2008 post doctor Erik Monsen started working on his project, which to a large extent concerns the problems presented here under chapter 2.

[4] Are Stenvik/ Ole Andreas Rognstad, Hva er immaterialretten verd? Om erstatning og annen kompensasjon ved immaterialrettskrenkelser, in Bonus Pater Familias, Festskrift til Peter Lødrup, Oslo 2002 s. 511-548.

Secondly, the Supreme Court has indirectly addressed the subject in the case Rt. 1992 p. 1469. In this case a woman got compensated for expenses incurred in order to rent a car for fulfilling a planned holiday trip. Although the court kept their arguments within conventional frames, the fact remains that the interest that in reality was compensated was the interest of recreation. An important task is to elaborate how far one can transform initially non-economic interests to economic interests by way of argumentation. .This has been a theme of discussion in a brief Swedish article, but there is definitively more to be said on the subject.[5]

The question must also of course be analysed in the light of the common European tort law and developments on a European level. Inter alia the judgement of European Court of Justice concerning compensation for loss of the interest of recreation, *Leitner v. TUI Deutschland GmbH & Co* C-168/00 (ECR I- 02631) and Principles of European Tort Law, Text and Commentary (Wien 2005), Chapter 2, with corresponding preparatory comparative works will be a good point of departure with regard to comparative perspectives. The subject has also lately been touched upon by a Norwegian scholar, Endre Stavang.[6] He has especially emphasized the need for economic analysis as a device for deciding the borderline typology.

An interesting angle is nevertheless to look at the temporal dimension of the problem: The plaintiff initially had a damaged car. After this damage had materialized itself she converted this physical damage into an expense; the cost of a renting a car. The question of whether this expense should be compensated turns on the question of proportionality between the initial negative effect and the size and the purpose of the incurred expense. This structure can be recognized whenever an initial physical damage is converted into an incurred expense, see for example the description of preventive expenses no 3 below. Hence consciousness of the temporal dimension helps us to sort out the ontological structure of the juridical problem.

3. Compensation of preventive expences[7]

Sometimes a potential claimant already prior to the time when a physical damage occurs realises that he has to take certain measures to avoid or minimize a threatening danger of damage. Such measures will lead to certain efforts, expenses or costs that with a wide expression could be named as “preventive expenses”. Problems connected to preventive expenses have never been distinctly elaborated within Norwegian or Nordic tort law theory.

In different comparative research projects on a European level one has, however, recognised the justification of claims for compensation based on preventive expenses.
This is *inter alia* evident in the ”Principles of European Tort Law” (PETL), where one article is solely dedicated to the preventive expenses, cf. Art. 2.104.[8] It is also of a certain interest

[5] Håkan Andersson, Ekonomisk-ideeell skada, i ”Nybrott og odling”, Festskrift til Nils Nygaard, Bergen 2002 p. 7-21.
[6] Endre Stavang, Det erstatningsrettslige skillet mellom økonomisk og ikke økonomisk tap, TfE 2006 p. 126 ff.
[7] After the project was designed and applied for (summer 2007), the project leader has been working on a preliminary article on this subject. The manuscript now comprises aproximately 50 pages. A project on preventive expences will to some extent have to be coordinated with the project leader´s allready nearly finished work on the subject.
[8] See how the question of preventive expenses is solved in other European countries, Winiger/Koziol/Koch/ Zimmermann (eds.), Digest of European Tort law, Volume 1: Essential cases on Natural Causation, SpringerWienNewYork 2007 p. 169-192. See also PETL; Commentary p. 39 fn. 3.

that the EC-directive 2004/35/CE Art. 8 cf. Art. 6 recognizes the need for compensation on grounds of incurred preventive expenses.

In times of an increasing impact of European impulses on different levels, there are good reasons for a close scrutiny of this area of tort law. The questions that arise from the complex of problems mentioned are of practical importance. This is in a striking manner illustrated by the so called "Lillestrøm- case", which was litigated in the Supreme Court of Norway in May 2006. This case concerns a train-accident which involved a carriage containing explosive gas. In the immediate aftermath of the accident the centre of Lillestrøm was in great danger. Many people evacuated from the area, and a number of persons and companies consequently incurred expenses. The question of to which extent one is entitled to recover such expenses is, however, unclear.

Apart from being a problem of practical importance and of academic interest, the question of compensation for preventive expenses is of economical importance to society. Tort law rules have on account of historical reasons generally an ex post-approach.[9] In a modern, highly advanced society, the goal should be to avoid that damage occurs at all. From such a perspective it is paradoxical that the ex ante approach in incurring expenses to avoid damage has an insecure and unsettled status within the Norwegian and Nordic tort law regime. This calls for deeper analysis. One theme of interest is the question of how Law and Ecomomics can bring valuable insights concerning the presented object of research.

The temporal dimension of this problem is highly interesting. Particularly the fact that the expense is incurred already before the actual damage has taken place is very interesting from both a systematic and an ontological point of view. Granting compensation for the mere risk of damage challenges very profound elements within tort law, namely the concept of causation. This concept will ordinarily presuppose that the expense emerges only after the damage has materialised, not before.[10] Still there may be good reasons for an exception from the ordinary chronology of torts. Such reasons may be explored and elaborated by way of applying the temporal approach. This way the structure of proportionality mentioned above in no 2 will come to the fore and point out operational criterions deciding whether the preventive expense is compensable or not.

4. Compensation of frustrated expences

Under Norwegian law it is an unanswered question to which extent one is entitled to compensation for frustrated expenses. The problem is only mentioned very briefly in the standard literature.[11] One simple example of the problem is that A invests a lot of money in installing an advanced TV-set with satellite-antenna in his house and signs a long term contract on deliverance of programmes from a great variety of TV-chanals. Then he becomes blind due to an accident for which B is responsible. Can A claim compensation from B for his economical loss that stems from his useless investments? There is no deeper analysis of this kind of question within Norwegian or Nordic tort law theory. An important analysis of the problem under German and Austrian law is, however, available, cf. a book of Thomas Schobel: "Der Ersatz frustrierter Aufwendungen", Vienna 2003. This analysis can be useful

[9] An important background may be the great influence of the theoretical works of Fredrik Stang, who was deeply inspired by philosophical theories on causation, theories that presupposed that an effect – such as damage – already had occurred.
[10] See for example Richard Epstein, The temporal dimension of tort law, U. Chi. L.R. 53 (1985) s. 1175.
[11] Cf. Nygaard, Skade og Ansvar 2000 p. 79.

and serve as a point of departure for a research project that concentrates on compensation for frustrated expenses in Norwegian tort law. This way one can provide for the important comparative and European dimensions that were highlighted in the introduction above. Moreover, the problem can be elaborated in connection with similar problems within the law of obligation, such as the question of expenses incurred in belief of a future binding contract (”negativ kontraktsinteresse”).

When applying the temporal matrix on this problem an interesting point comes to the fore: The expense is incurred long before the damaging event. The damaging event does not actually cause the expense, but rather frustrates the good in which the plaintiff has invested. This way the ordinary parameters connected to factual causality and adequacy do not apply, or apply only in a very special manner. The insights of focusing on the temporal dimension may provide clarity regarding the question of how to qualify frustrated expenses as compensatory.

5. Causation within assessment of damages – rethinking “the principle of difference”

Tort law theory has historically concentrated on the normative framework that regulates the question of which person to make legally responsible for an occurred damage. The theorists have only to a modest extent focused on questions emerging *after* the damage has arisen, how to assess the damages. One complex of problems that need theoretical scrutiny seems to be the principle of difference as a tool for assessing damages. The principle of difference can in short be explained as a sort of test for deciding the award in tort cases. One asks simply which economical position the claimant (hypothetically) would have been in without the damage and compares the economical result with the claimant’s (factual) position now, after the occurrence of the damage? The difference between the levels of prosperity in the two positions is the hallmark for the assessment of damage.

The prosess of assessing damaging by applying the principle of difference calls for several questions: Which causal connections are relevant to the question of assessment? Which hypothetical dimensions are involved in the process of applying the principle of difference? On which principles do we use prognosis for the hypothetical future development? Some of these problems have quite recently been elaborated by a member of the research group on tort and insurance law in Bergen, cf. Magne Strandberg, Skadelidtes hypotetiske inntekt – om erstatningsutmåling og bevis, Bergen 2005. This work has shown that there definitely is need for further research within this topic. Moreover, the principle of difference was applied in an important supreme court case last year, the KILE-case, Rt. 2005 p. 41. The case concerned the question of to which extent a monopolist company should be compensated for losses that emerged solely through public regulations of the monopolist position in supplying electricity. In the case one judge dissented with a votum that indicates that the plain and unreflected manner in which the majority applied the principle of difference leaves important question unanswered. The problems concerning the principle of difference has not been properly addressed in Nordic tort law theory since 1950, when Ulf Persson published his work “Skada och Värde”. A research project that builds a theoretically thorough foundation for an analysis of the principle in light of a modernised concept of damage would certainly be valuable to Nordic tort law.

There is of course also a temporal dimension involved in the process of assessing damages by applying the principle of difference. To start with, the fixation of the plaintiffs economic position before the damage refers to a point in time that precedes the point in time for which

one assesses the plaintiffs economic position after the damage has occurred. In addition one has to deal with the hypothetical question of how the plaintiffs economic position would have been had the damage not occurred. All these question refers to certain points in time, and for some of the questions it is unclear which point in time should be taken as the measuring point. Particularly when it comes to personal injuries the temporal dimension has profound implications: The very fact that many personal injuries never can be amended bur will linger on for the rest of the victim's life generates special problems. The temporal dimension thus includes the future, the period in time after the award has been decided and paid. Normative consequenses of the possibility of futural unforeseen developments is for example one problem that might be worth analysing.

6. Passing on

One problem so far unexplored regards situations where the plaintiff is in a position to pass on his loss to customers or other forms of contractual parties. One may think of a seller of shoes that unlawfully has been paying to much import duty for each pair of shoes. The sum of money may be compensated by the municipality who has claimed to much duty paid. However, because of the taxation the shoe-seller has raised the price of each pair of shoes. Before the mistake if paying to much duty has been discovered, the shoe-seller has regained his loss by raising the price on each pair of shoes. Does the fact that the plaintiff has mitigated his loss by passing it on to others justify that his claim of compensation from the tortfeasor be reduced? One view is that the plaintiff otherwise will have double compensation. Another view is that the loss has already emerged before the plaintiff passes it on. One might also see his possibility to mitigate his loss by passing it on as merely a consequence of the plaintiffs selfmade privilege of enjoying a strong position in the market.

As one can see, the temporal dimension is quite important when dealing with passing on. One simple observation is that the action of passing on in principle takes place only after the damage has occurred, but before the award is settled. This figure may however be too simplistic: One must also discuss whether the plaintiff who continuously passes on his potential loss has to reduce his claim to the same extent that his loss is covered by the third party. In this respect the subject touches up on the question of "kompensasjonsrelevans" (compensation relevance) or more precisely "skadeoppgjørsrelevans" (relevance to the assessment of damages), a subject which recently has been elaborated by the project leader.[12] The studying of the phenomenon of passing on may bring further knowledge to this part of the scientific frontier whithin tort law.

7. A monography on "The temporal dimension of tort law"

The specific areas of research that are mentioned above are all connected to the concept of damage. A common feature of the topics is furthermore that all questions make it necessary to elaborate the *temporal dimension* within tort law regulation. By this expression I refer to the fact that the regulation of preventive expenses of frustrated expenses focuses on a period of time that passes prior to the time when an actual physical damage occurs. In opposition questions regarding the borderline between ecomomic and non-economic interests in a more traditional manner focus on the period after the occurrence of a physical damage. However, when it comes to pure economic loss, one is deprived of the signpost that is constituted by the

[12] Bjarte Askeland, Kompensasjonsrelevans og skadeoppgjørsrelevans – Rt. 2005 s. 769, TfE 2006 p. 3-21.

physical damage. The second and the third of the above mentioned heads of damage challenge the traditional Nordic tort law approach because this approach presupposes an application of traditional doctrines on causation. This traditional concept presupposes that the damage occurs before or at the same time as the event that produces the loss. This will not be the case when it comes to preventive or frustrated expenses, and the approach related to pure economic loss will also need to break free from the constrains of traditional causal concepts and doctrines.

The above mentioned points show that Nordic and European tort law may benefit from a work which presents an alternative approach to the constrains represented by rules on causation. Such an approach may be fruitful in order to justify tort law solutions on the issue of preventive and frustrated expenses. The leader of the project will therefore write a monography − in English − on the temporal dimension of tort law and the concept of damage. Askeland has already in his monography on indemnity and contribution "Tapsfordeling og regress", Bergen 2006 cf. p. 18 ff and 36 ff. presented a theoretical framework regarding "the chronology of tort law", connected to the concrete questions in the book concerning indemnity and contribution. This element in the mentioned book can very well be perceived as a preliminary work that shows that the temporal approach is of practical validity. Moreover, the efforts of writing the mentioned book has given new insights with regard to the temporal dimension that need further elaboration and development within a more general theoretical structure.

The monography on the temporal dimension of tort law will hopefully be of interest to foreign tort law scholars throughout the western family of jurisdictions. A comparative overview will easily show that the all the western tort law regimes have tied their doctrines closely to the western philosophy on causation. Hence the temporal dimension (which, quite illustrating is one of Immanuel Kant´s profound categories of perception) plays an important role in the tort law approach. An analysis that puts the pros and cons of the temporal paradigm to the fore will hopefully be of significant academic interest. Moreover, the work can easily integrate questions related to the issue of European harmonisation of tort law.

The mentioned monography will provide for a suitable "thematic umbrella" that covers all the other areas of research. The supervising of the work on the specific areas can in a fruitful way be combined with the research on the temporal dimension. The other workers on the project will probably gain from this interaction between special and general approaches to the concept of damage. Although the various publication will be standing on their own feet and be one man-products there are good chances of a fruitful and inspiring teamwork within the research group. At this point one must bear in mind that there are also four other scholars in the group who presently work on theses financed by the faculty, some of them working in adjacent fields of the tort law complex. Both Arnt Erlend Skjefstads project on *compensation lucrum cum damno* and Miriam Skags project on *prescription* features important temporal dimensions. The project may in this manner serve as a vehicle for building a vivid and qualified scientific research group on tort law in the law faculty in Bergen.

7. International collaboration

The project leader (Askeland) is engaged in several comparative research projects, cfr. his CV. Through this work he is constantly involved in a European network of tort law scholars which comprises tort law experts from many of the European countries. These contacts will

certainly be valuable to the comparative dimensions of the project and there will at all times be good possibilities of consulting European colleges on matters of difficulty that concerns the European or international aspects.

One should also mention that the project leader will participate in the second part of the research project on National Court Practice and Tort Law, which will focus on the concept of damage. The first part of this project has now been published in the new book Helmut Koziol/Benedict Winiger/Reinhard Zimmermann (eds) Digest on European Tort Law, Volume one, Vienna 2007. The second part, which will be Volume two; will tentatively start in June 2008 (information gathered in april 2007 through informal conversation with one of the project leaders, Prof. Benedict Winiger, Geneva). Judging from the experiences of the first part of the project (Causation), this second part on the concept of damage can provide very useful comparative inputs. The parallellity of our project and the European project is optimal when it comes to securing that the Norwegian research keeps up with the problems and academic trends in this field throughout the European countries. Additionally will Askeland´s participation in the project on EC tort law safeguard that the project is in line with and informed about the key issues of EC tort law concerning the concept of damage.

The project leader has contemplated the question of cooperating with a foreign college in a foreign institution on this subject. The character of the project does not, however, invite to such cooperation except for the work on the English monography. The five other topics will probably be best covered by Norwegian scholars researching Norwegian law in comparative light. As for the monography, the project leader prefers to work on the book alone, simply because this seems the most effective working method when it comes to this kind of research within the profound structures of tort law. The above mentioned framework of European comparative research projects will, however, contribute to and safeguard an internationalising of the Norwegian research in the field of tort law. The newly started “Nordic network of tort law scholars” will also be a useful tool for securing the international dimension within the research project.