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XXVIII. Sweden

A. Legislation

There were no changes in Swedish tort law during 2021 of particular comparative interest. 1

B. Cases

1. Supreme Court (Högsta domstolen) 26 February 2021, Nytt Juridiskt Arkiv (NJA) 2021, 46: Close Enough? Damages to Close Relatives

a) Brief Summary of the Facts

A woman was tragically killed in a traffic accident. She had a passenger in the car, her partner, who also was injured in the traffic accident and witnessed the woman's death. 2

The partner claimed damages for his own personal injury and for the mental distress he suffered as a result of his partner's death. 3

The woman who caused the traffic accident was convicted of negligently causing the death of another (and negligently causing bodily injury). She had opposed the claim for damages on the grounds that: (a) she had not committed a crime, and (b) that the man did not have a right to damages since he was not a close relative to the woman according to the law. 4

The district court, finding the woman guilty as charged, found in favour of the claimant. The deceased woman and the man did not share a household but they had had a loving and close relationship for more than three and a half years. They had contact with each other almost every day, met regularly and planned to spend their future together. Although they did not share a household, the district court found that the woman's partner should be regarded as a close relative and be entitled to damages for his mental suffering. 5

The verdict was appealed by the defendant, but the Court of Appeal upheld the district court's decision. The defendant appealed to the Supreme Court. 6

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b) Judgment of the Court

7 The matter for the Supreme Court to decide upon was if the partner could be entitled to damages according to the Tort Liability Act (*Svensk Forfattningssamling*, SFS) 1972:205), ch 5, sec 2. According to this provision, entitled 'compensation to close relatives', compensation shall be awarded for the personal injury that someone with a close relationship to the deceased has suffered as a result of the latter's death.

8 The Supreme Court pointed out that the legislator's objective has been to create clear and easily applicable legislation in order to facilitate settlement procedures for everyday claims. Insurance companies, the Crime Victims Compensation Board and the Traffic Compensation Board frequently deal with such types of claims.

9 One way of achieving a clear and easily applicable rule is that no medical evidence is needed when a close relative claims compensation for this type of personal injury, as long as the claim remains within the form of the templates provided. The only requirement is that the pain described is such that it can be deemed possible to prove medically – a mere statement of psychiatric suffering is not enough. However, if the claim contains more information than can be included in the template, evidence is necessary.

10 Another way of creating a practical regulation is to limit the group of relatives entitled to damages. Only those who are considered to have a close relationship to the deceased can be granted damages. The provision in the Tort Liability Act is directed to spouses, cohabitees, children and parents. Primarily, it is persons who lived together with the deceased at the time of death who are entitled to damages, but, according to the preparatory works, it is not impossible that other persons can be entitled to damages if they had such a close affinity that is normal when people live together.[1]

11 The Supreme Court stated that the question if someone is considered a close relative, and thereby entitled to damages according to ch 5, sec 2 TLA, requires a nuanced assessment, considering all circumstances. For persons who do not live together, it is not sufficient that they had a close and steady relationship, frequently socialising with one another – more intense contact is needed.[2]

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1 Proposition (Prop) 2000/01:68, at 72 and Statens Offentliga Utredningar (SOU) 1995:33, at 392.

2 The Supreme Court refers to a case where a group of siblings were entitled to damages, although they did not live together (NJA 2005, 237). They lived close to each other, worked in the same family company where they met every day, the community gave evidence that the family were unusually close, and the deceased had been a central figure in the business and always took part in the siblings' own family gatherings.

When considering the facts of the case, the Supreme Court concluded that the deceased and the partner could not be regarded as such close relatives that would give the latter a right to damages. They had had contact with each other on a daily basis via telephone and text and lived together while on holiday. Their multi-year relationship, frequent socialising and staying with each other in their homes was, however, according to the Supreme Court, not sufficient to be comparable to cohabitees, and the partner's claim for damages was rejected. **12**

c) Commentary

The need for a clear and easily applicable rule is of course understandable, given the multitude of cases that are decided on by insurance companies, the Traffic and Crime Victim Compensation Boards. The different means to facilitate – no requirement of intent or negligence, no need for medical evidence (as long as the claim remains within the form of the template) and a pre-defined group of those who can be entitled to compensation – are all a result of the presumption that close relatives suffer harm when a close relative dies as a result of someone else's act (or omission). The aim of damages is not to compensate general bereavement, but pain and suffering. As a consequence, a higher level of compensation is possible for those who can provide evidence that their pain and suffering has exceeded the level contained in the template. The template has different levels depending on the tortfeasor's guilt; in cases of intentional murder, the level of damages is doubled.[3] **13**

There is no doubt that all of the above has made it much easier for close relatives to receive compensation in cases where someone close to them died, regardless of the cause being a traffic accident, a violent crime or perhaps a work place accident. However, there are at least two questions to address. The first one, and to which the legislator has directed their attention, is the level of damage in the template. Since the type of harm that close relatives suffer has been described and subsumed under the heading of pain and suffering, there are limits to the extent to which damages can be awarded. Last year, a Governmental Official Report was published that suggests, among other things, an additional type of damage suffered by close relatives of persons who were killed in the course of certain types of crimes being committed.[4] This would result in a higher level of **14**

3 The standard sum for pain and suffering to close relatives is SEK 30,000 (approx € 3,000) and in cases of manslaughter or murder, compensation is paid with SEK 60,000 (approx € 6,000).

4 SOU 2021:64. If the suggestions are accepted, I will return to the legislative changes in next year's report.

damages in certain situations when it is considered that relatives of crime victims are undercompensated for the harm they suffered.

15 The other question that arises in this case is the group of relatives entitled to damages. It has always of course been possible to question the presumption that all people who live together have a close relationship with each other and if other persons outside the household community had closer bonds to the deceased than family members living under the same roof. However, this type of under or over inclusiveness is likely to be the price to pay when striving for regulations that are easy to apply; templates will always be only a rough guide since they do not take all individual circumstances into account.

16 Given the living conditions in Swedish society, it might be appropriate to think twice when it comes to excluding people who have a close relationship in all aspects apart from the living arrangements. According to Eurostat, more than 70 % of households in Sweden consist of one person, but this is not the same as being single. There are a number of factors (demographics, people move away from home at a young age, etc) that can explain this high figure. In the present context, it is sufficient to point to the fact that some people choose to continue living in separate households although they have a relationship with someone. Other factors may be decisive, such as lack of adequate living space, the need for two single parents to continue living close to children's schools, or adults who simply believe that separate households are the best arrangement in their relationship.

17 There is really no reason not to presume that the partner in the Supreme Court case suffered such harm that would have been compensated had the couple lived together. In addition, there was quite a significant amount of evidence to indicate that they did indeed have such a close relationship that the legislation aims to protect by awarding damages. In comparison, there are families who cohabit but where one of the adults spends a lot of time away from home due to working conditions. It is difficult to explain why damages would be unquestioned in the latter case, especially if those concerned only lived together for a couple of months, and out of the question in the present Supreme Court case or others where a couple have had a long-term relationship, although not under the same roof. In addition, the partner was himself a victim of the car accident (he suffered personal injuries) and witnessed the woman's death. These are circumstances that, in previous rulings from the Supreme Court, up until the court practice was codified, were taken into account as arguments to support a close relative's entitlement to damages.

18 At the same time, the value of templates will be undermined if it is too easy to circumvent the stipulated boundaries. It will most certainly be a question for further court practice to assess when factors of consideration, eg how long the

relationship lasted, how and when a couple socialised (week days, weekends, holidays – cf NJA 2005, 237), can be deemed sufficient for awarding damages in accordance with ch 5, sec 2 TLA.

2. Supreme Court (Högsta domstolen) 26 March 2021, Nytt Juridiskt Arkiv (NJA) 2021, 159: Reduction of Insurance Compensation – Rules of Thumb

a) Brief Summary of the Facts

A policyholder reported metal damage to his camper in August 2017. According to **19**
the policyholder, the damage occurred after his purchase of the camper, but it later turned out that this was false. During the claim settling procedure, the camper was completely damaged in a fire. The insurance company (Folksam) rejected the policyholder's claim as regards the fire, since he had intentionally given false information about the other damage, and he had not corrected this during the settlement procedure for the damage caused by the fire. The policyholder then sued Folksam, claiming compensation of SEK 200,000 for the damaged camper.[5]

The District Court rejected the claim in total, but the Court of Appeal found **20**
that the insurance compensation that would have been paid out had the policyholder not lied about the other damage to the camper, should only be reduced by half. Folksam appealed to the Supreme Court.

b) Judgment of the Court

The Supreme Court's leave of appeal took as its starting point the Court of **21**
Appeal's assessment that the camper was worth SEK 150,000 before the fire and that it had been worth SEK 190,000 without the damage to the body. It was also established that the policyholder had given false information in his claim for insurance compensation in August 2017 and that he had upheld this during the claims settlement after the fire.

The Supreme Court's question was the extent to which providing false in- **22**
formation in claims settlements should affect the level of insurance compensation when the policyholder is a consumer.

5 Approx € 20,000.

23 In its ruling, the Supreme Court began by establishing that the insurance system depends on the honesty of policyholders and insured parties and presupposes that these are loyal to the insurer. Disloyalty must be subject to penalties. For this reason, rules on sanctions can be applied with the consequence that the policyholder's compensation can be reduced, partially or in full.

24 When deciding on the potential level of reduction of insurance compensation, there are a number of factors to consider, according to the preparatory works.[6] The policyholder's level of guilt and the amounts concerned in the individual case should be considered. If the policyholder has used elaborate methods to trick the insurance company, the level of reduction could be greater, and the level of amounts that the policyholder has wrongfully tried to receive from the company could also be taken into account.

25 The Supreme Court stated that this means that all circumstances must be considered when deciding if, and if so, to what extent, the level of compensation should be reduced. The actual risk of the insurance company being deceived and the amount of the undue compensation that could be paid out as a result of the deception must weigh heavily. On the other hand, the effect on the policyholder of a reduction must be considered, since a reduction can sometimes be unjustified, particularly if the insurance compensation is intended to cover the policyholder's basic needs. If the policyholder voluntarily corrected the information previously given, this could result in a smaller reduction or no reduction at all.

26 The Supreme Court continued by giving a general description of different situations where a reduction of compensation could be made and stated that, for practical reasons, any reductions should be made in a more generalised way, ie in quotas.

27 As a rule of thumb, a reduction of a quarter could be fair in cases where (a) incorrect information was given with gross negligence; or (b) if incorrect information was provided intentionally but this information had but a minor significance for the insurance claim; (c) intentionally providing false information can cause a 50 % reduction; and (d) if there are any kind of aggravating circumstances (apart from giving false information intentionally) a 75 % reduction can be motivated, eg if the policyholder tried to receive a significantly higher level of compensation than they are entitled to. (e) Complete reduction (to zero) of compensation should be appropriate in cases where the policyholder used elaborate methods in order to deceive the insurer, eg when false documentation or false witness statements were given.

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6 Prop 2003/04:150, at 448.

The Supreme Court concluded this section by reiterating that the rules of thumb must always be accompanied by a careful consideration of all circumstances in the case. 28

In the case at hand, the Supreme Court points out that the policyholder intentionally gave and upheld false information that was of significance for the claims settlement. In such a situation, there are reasons to reduce the compensation by 50 % (cf no 27 (c) above). However, there were no aggravating circumstances in the case and the sum of the incorrect compensation that could have been paid due to the false information was not substantive enough to motivate any additional reduction. All things considered, the Supreme Court reached the conclusion that a reduction of 50 % would be fair. 29

c) Commentary

In this case, the Supreme Court took the opportunity to provide the insurance industry with guidelines for future cases of fraudulent actions where policyholders provide incorrect information in insurance claim settlements. 30

It is not new to the insurance system that intentional or grossly negligent conduct on the part of the policyholder can render reductions of insurance compensation. In cases where the policyholder has caused their own damage with intent, or has intentionally ignored safety requirements, the insurance company can reject the claim altogether. In cases of gross negligence, a reduction can be made but only when minor negligence can be attributed to the policyholder will this not lead to any reduction. 31

This case's newsworthiness is that the Supreme Court has established rules of thumb and different quotas depending on the policyholder's own behaviour in the claims settlement procedure. The rules of thumb are in line with the manner in which intent, gross negligence, negligence and minor negligence are dealt with in other areas of application of the Insurance Contracts Act. 32

3. Supreme Court (Högsta domstolen) 21 June 2021, Nytt Juridiskt Arkiv (NJA) 2021, 473: Liability for Storm Water System

a) Brief Summary of the Facts

An association claimed damages from a neighbouring housing cooperative asserting that the cooperative's storm water pipe had caused water to penetrate into the 33

association's basement over several years. This had in turn caused damage and subsequent costs for the association.

34 Primarily, the association argued that the cooperative was strictly liable according to special, non-regulated principles on strict liability (established in court practice). If no strict liability could be established, the association argued that the damage was caused by negligent omission (failure to take relevant action on the storm water system). The cooperative admitted that some water had flowed from the storm water system into the basement, but contested the claim.

b) Judgment of the Court

35 The district court examined all potential reasons for holding the cooperative strictly liable by comparing the situation to previous rulings on non-legislative strict liability from the Supreme Court (NJA 1991, 720; NJA 1997, 468; NJA 1997, 684 and NJA 2001, 368).[7] As could have been expected, the district court concluded that since it is highly uncertain when someone can be held strictly liable without legislative support, and that Swedish court practice is reluctant in general towards strict liability in those situations, it would be excessive to hold the cooperative strictly liable for the storm water system. Furthermore, the district court could not find sufficient reason to consider the cooperative liable for negligence in omitting to take action on the storm water system. The claim was thus rejected.

36 The Court of Appeal concurred with the district court's assessment that it was more likely than any other potential cause that the dysfunctional storm water system had caused the water to leak into the basement. However, the mere ownership of the storm water system is not sufficient to create liability. The Court of Appeal could not find sufficient reason to impose either strict liability on the cooperative or to find any negligence on its part. The association appealed to the Supreme Court, which granted leave to answer the following question: Under which circumstances can a property owner be held liable for a neighbour's damage that is caused by water penetration from a faulty storm water system on the owner's property?

37 The Supreme Court started out by pointing out that a tortfeasor can be held liable for negligence in both acts and omissions. Liability for omissions can be

7 In legal doctrine, attempts have been made to summarise the different factors that can be derived from the Supreme Court cases when trying a case of potential strict liability outside of legislation. See *H Andersson*, Ansvarsproblem i skadeståndsrätten (2013) 308–312 and 334–338.

established when the tortfeasor has a duty to prevent or limit the consequences of their creation of risk. The responsibility to act can be found in legislation or in other situations where there is a particular connection between the tortfeasor and the potential risk. Such a duty to eliminate or limit risk can be motivated by concern for the surroundings. In some situations, this duty is found in legislation, eg environmental law.

38 The Supreme Court moved on to account for its earlier rulings on water damage, and concluded that mere *ownership* of a common facility for storm water cannot be put on a par with the *operation* of different water facilities that were the object of the previous Supreme Court rulings. Even if attention turns to the general requirement of consideration between neighbours (which can be found in the Code of Land Law, ch 3, sec 1), it is not possible to impose liability on the property owner regardless of negligence.

39 After deciding that strict liability is not an option in this case, the Supreme Court addressed the question of negligence by omission. Any decision on the liability of property owners must, according to the Supreme Court, be based on the kind of actions that can reasonably be demanded of an owner. Any kind of knowledge of deficits or risk of deficits in the system and its functionality that the owner has or should have had is significant. In assessing what kind of risks that should be known to a property owner, one can consider how old the facility is, its construction and any other factors that are known to be potential causes of obstruction for the system's function (eg roots, sagging, dampness).

40 In situations where there are more than insignificant indicators that something might be amiss, the property owner should act to restore the facility's proper state and function, in order to make repairs to avoid harm to the surroundings. If no sufficient action is taken, the property owner can be held liable for damage caused by negligent omission.

41 The Supreme Court also made a statement on the burden of proof. The claimant has, of course, the burden of proof to show that the damage was caused by deficits in the facility. However, the claimant does not have to prove that a certain act by the property owner would have prevented the damage; it is sufficient if they show that there were in fact suitable risk-reducing actions that the property owner could have taken. If so, the property owner must show that these actions would not have helped.

42 In this concrete situation, the Supreme Court found that the storm water system was at least 70 years old when the cooperative bought the property, and that it already, for that reason (and because neighbours could suffer extensive damage if the system malfunctioned), was necessary to take risk-reducing measures, eg an inspection. Even if an inspection would not necessarily have resulted in discovery of the deficits, it would have had a significant risk-reducing effect.

The delay in controlling and acting until a leakage occurred was therefore not compatible with the obligation to show consideration between neighbours. The cooperative was thus found liable for the association's damage.

c) Commentary

43 There is really nothing new in this case, but a reiteration of how a negligence case should be argued. However, it is important to note that this question on potential risk-reducing actions is still a question within the negligence test that results in a conclusion on whether or not the tortfeasor could and should have acted (differently), ie is liable of negligence – not a question of causality.

44 In this sense, the Supreme Court provided a clear structure in their reasoning on negligence in cases of omission. It is useful to follow this structure to avoid confusing questions of negligence with questions of causality.

45 Another point worth mentioning is that this case indicates that there is a significant difference between *ownership* and *operation* of different water systems. Risks and assessments of risk, including risk-reducing measures and other precautionary measures, cannot be viewed in the same way when looking at a storm water system or a district heating system. Those who might have thought that the Supreme Court, in its previous rulings, had established a strict liability for all types of water systems now have to think again.

4. Supreme Court (Högsta domstolen) 8 October 2021, Nytt Juridiskt Arkiv (NJA) 2021, 746: Near-Fatal Traffic Accident; Damages for Close Relatives

a) Brief Summary of the Facts

46 A and B entered into a so-called, 'game of chicken'. They drove their cars at high speed towards one another with the intent of causing the other driver to swerve first. Their driving ended in a frontal collision, which caused extensive damage to their vehicles and serious harm to themselves and their passengers.

47 One of the passengers, a 16-year-old girl, suffered extensive brain damage, unconsciousness, pressure injuries to her heart and lungs and a fractured wrist. Her injuries were so severe that her condition could be described as a vegetative state. In practice, all of her bodily functions have ceased to exist, and the level of invalidity is assessed at 99 %.

b) Judgment of the Court

After trying the case in the district court and Court of Appeal, the drivers were convicted of causing bodily injury or illness, and reckless driving. The Supreme Court gave leave of appeal to the following matter: what level of damages for non-pecuniary harm should a victim be awarded when she has suffered serious harm by the crimes that the defendants were convicted of? Are there reasons to establish a template for compensation to close relatives in such cases? **48**

The Supreme Court reiterated what it had previously stated in other cases of non-pecuniary damages to victims of crimes which were committed with gross negligence (NJA 1997, 315 and NJA 1997, 572). The starting point is that only intentional crimes can render a right to non-pecuniary damages according to ch 2, sec 3 TLA. However, damages can be awarded in cases of the negligent causing of bodily harm in conjunction with traffic offences if there have been aggravating circumstances to the extent that the criminal act could be considered as almost intentional, thereby having the same offensive and violating effect on the victim's integrity. The level of damages should however be set slightly lower than if the crime had been committed with intent. The claimant was thus awarded SEK 110,000 (the standardised sum for non-pecuniary harm is SEK 125,000 in cases of attempted murder or attempted manslaughter).[8] **49**

The parents of the victim claimed compensation for the pain and suffering they had been caused as a result of their daughter's grave injury. According to ch 5, sec 2 TLA, a tortfeasor held liable for causing personal injury that has led to death shall pay compensation for the personal injury that someone with a close relationship to the deceased suffered as a result of the death. In an earlier ruling, NJA 2006, 181, the Supreme Court established that such compensation to close relatives can also be awarded in cases where the tortfeasor, through intentional violence, caused serious harm to a person, who as a result has 'hovered between life and death for a not insignificant amount of time'. The Supreme Court now decided in the present ruling that the same has to be said in cases where the personal injury was caused by gross negligence, close to intent. **50**

The next question for the Supreme Court was whether a special template should be established for these cases. The Supreme Court had previously decided that there should not be a separate template for close relatives in situations where someone was killed by intent or with such gross negligence that borders on intent; in both situations the relatives can be awarded SEK 60,000 for pain and **51**

8 Approx € 11,000 in comparison to approx € 12,500.

suffering.[9] Arguing along the same lines, the Supreme Court stated that the level of guilt should be immaterial in theses cases also, where the seriously injured person has not been killed but 'hovered between life and death for a not insignificant amount of time'. Instead, the consequence that the victim has survived will be decisive, and the Supreme Court stated that a standardised sum for pain and suffering to the close relatives should be SEK 20,000.[10]

52 In the present case, the injured girl's parents had presented extensive evidence proving that their emotional distress exceeded by far the level of pain and suffering compensated for through the standardised sum. Their claim for damages – SEK 50,000[11] – was considered fair, and their claim was approved.

c) Commentary

53 One of the judges in the Supreme Court disagreed with the reasoning in the judgment. He distinguished between the types of damage that the victim suffered in the 2006 case and the present case and argued that, while € 2,000 seems fair when someone has been injured in the same way as the young man was in the 2006 case, the present situation is very different. Although the injuries in the older case were severe – the young man hovered between life and death for two weeks and during that time he was unable to communicate with his relatives – the injuries were temporary and the young man 'returned to life'.

54 In the present case, the young girl had admittedly survived, but at the time of the court proceedings, she had been in a vegetative state for a couple of years with no hope of improvement. All contact with her was lost and the permanent level of invalidity was assessed at 99 %. The judge argued that this means that the parents' suffering continues, every day. This suffering is of equal severity and significance to cases where a close relative has been killed. It could even be argued, I think, that the personal injury that the close relatives suffer might be even worse than in cases where someone died immediately.

55 Due to his reasoning, the judge found it unnecessary for the parents to provide evidence proving their suffering. Also for reasons of fairness, he thought that the level of damages should be the same as in cases where a close relative has died, ie € 6,000 if death has been caused by intent or negligence bordering

9 Approx € 6,000.
10 Approx € 2,000.
11 Approx € 5,000.

on intent, and € 3,000 in all other situations where someone can be held liable for someone else's death.

In the governmental report that suggests higher levels of non-pecuniary damages to crime victims, there is also a suggestion to provide additional damages – 'special compensation for relatives' – to close relatives when someone has been killed intentionally.[12] There is regrettably no discussion on situations where the victim survives but is still 'lost' for their relatives, such as in the present case, so the position still stands that close relatives have to present evidence that supports their potential claim for a higher level of personal injury damages. **56**

However, the suggested new form of 'special compensation' is a non-existent opportunity for relatives to receive since this requires that someone has been intentionally killed. It remains to be seen if the Supreme Court will expand the scope of application of this potential new rule on compensation in the future. **57**

5. Supreme Court (Högsta domstolen) 15 December 2021, Case no T-863-21: No Liability for Personal Injury

a) Brief Summary of the Facts

A mother visited an activity centre with her child. During the visit, the child jumped on an air cushion in a jumping pit and broke her ankle. The mother claimed that the activity centre should be held liable for negligently causing the harm; she claimed that the activity centre had breached its duty to supervise and maintain the jumping pit. The Supreme Court concluded that there were no circumstances to support her claim. **58**

b) Judgment of the court

In this case, the Supreme Court first describes in general how an assessment of negligence can and should be made in different situations. There are not really any surprises in this part. The Supreme Court reiterated what is included in a negligence test and that consent from the injured person can reduce the extent of liability. In sports and games, consent is of particular interest; the contestants participate voluntarily and there is often a significant risk of injuries. When **59**

12 SOU 2021:64, 245–254

assessing liability in these situations, the requirement of due diligence is often reduced.

60 The Supreme Court also pointed out that liability can, of course, be attributed both in cases of acts and omissions. The requirement to act in order to avoid harm can be found in law or other types of regulations, but can also follow from a previous creation of risk, which requires risk-reducing safety measures. Another category of situations where an omission can lead to tort liability is when there is a duty to supervise someone, eg a parent has to prevent their child from causing damage. To this category the Supreme Court added the authorities' responsibility to prevent people taken into care from being harmed.

c) Commentary

61 Of interest in this case – apart from the outcome – is what can be interpreted as a slight adjustment or clarification of what has been established in another case from the Supreme Court (NJA 2013, 145). This case was the subject of much debate and concerns the question of the burden of proof and what has to be proven in cases of omission. According to the Supreme Court, particular consideration can be necessary when a claim for damages is filed against someone who had a duty to supervise someone else and to prevent them from causing damage. In those cases, it is sufficient that the claimant shows that there were potential and suitable risk-reducing actions that could have been taken by the supervisor. In order to avoid liability, the person obliged to act must show that it would not have made any difference if such measures had been implemented. This paragraph from the Supreme Court can be interpreted as a general clarification of the scope of the burden of proof in cases of liability for omissions, since the court only makes a clear connection to cases where someone has the role of supervisor as a basis for liability.

62 In the present case, the Supreme Court found that the facility's supervision and maintenance of the jumping pit was sufficient and that no other precautionary measures or further assistance from staff in the jumping pit could be requested. The balancing of risk resulted in a negative outcome for the claimant; it is simply not possible to transfer liability for injuries in all situations – particularly when there was nothing more that could have been done to prevent people from harming themselves.

6. Supreme Court (Högsta domstolen), NJA 2021, 1038 I and II: Non-Pecuniary Damages; Significance of Victim's Own Behaviour

a) Brief Summary of the Facts and Judgment of the Court

The Supreme Court delivered their ruling on two cases where the focus was on the victim's own behaviour. The circumstances of the first case was the following: X met Y to buy narcotics, which he had done previously on a number of occasions. This time, X was robbed and Y was convicted. The district court and the Court of Appeal awarded X approx € 2,000 in non-pecuniary damages for a violation of his privacy. Y appealed to the Supreme Court, arguing that X should not be entitled to damages, or that the level of damages should be lowered. The Supreme Court found that X had not taken a deliberate risk in relation to the criminal violation that he was subjected to, and that he had not forsaken his demands for respect for his privacy. The fact that X had met Y in order to buy narcotics and thereby commit a crime himself did not influence the assessment. **63**

The second case concerned A, who started a fight with B. B reciprocated by stabbing A with a knife in the arm and chest. B acted in self-defence, but the courts found that he had used excessive force and he was convicted of aggravated assault. The question for the Supreme Court was the potential significance in the assessment of damages of the fact that A had initiated the fight that led to the knife-stabbing of himself. According to the Supreme Court, A's disproportionate violence towards B and the knife-stabbing that B had committed meant that A had been subjected to such a violation of privacy that renders a right to non-pecuniary damages. However, A's own behaviour was taken into account when deciding on the level of damages. Instead of approx € 7,500 (which would be the normal, standardised sum in such cases), A was awarded € 2,500. **64**

b) Commentary

In these two cases, delivered by the Supreme Court on the same day, the issues related to the circumstances under which the victim's conduct can have consequences for matters of liability and the assessment of damages. It becomes evident from these cases that it is necessary to distinguish between these two questions. **65**

Compensation for criminal violations constitutes damages for pure non-pecuniary (or pure non-financial) loss that does not require that there has been any physical injury. Compensation for a violation can be considered if someone **66**

seriously violates another person through a criminal offence that includes an attack on their person, liberty, peace or honour (ch 2, sec 3 TLA). The compensation for the violation is intended to compensate the person who has been violated for the negative feelings caused by the criminal attack, eg fear, humiliation, shame or the like. The extent of the compensation for the violation is determined on the basis of what is reasonable in view of the nature and duration of the act (ie the criminal attack) (ch 5, sec 6, para 1TLA). Moreover, particular consideration is to be given to certain circumstances enumerated in the provision. The starting point is that it is the violation that can typically be presumed to have arisen through the attack that is to be considered. This means that the compensation is determined from an objective perspective. However, the task of determining the amount of the compensation is essentially about putting a value on something that cannot be valued in money – the violation involved in being a victim of a crime.

67 If the person who has been violated has put himself in danger of being subjected to a crime, it can be considered as such conscious risk taking (cf consent) that they will not have a right to compensation. From the Supreme Court case, we can see that the conscious risk taking must be concrete rather than abstract in the sense that there must be some circumstances that create an awareness of potential risks. The mere fact that someone engages in a crime (purchasing narcotics) is not in itself sufficient. Moreover, the risk taking must also relate to the type of and extent of the violation that the person is the victim of. In the present case, the buyer could perhaps – theoretically – be aware of a risk that he would not get the agreed quality or quantity of narcotics, or perhaps that there could be a risk of being set up, but there was nothing in the parties' previous dealings to suggest that he would be attacked in the way he was. The violence was unrelated to his own actions (buying narcotics) and nothing beforehand suggested that he would be robbed. He could therefore not be said to have forsaken normal expectations of respect for his integrity, which is protected by law – even if you are a criminal.

68 In the second case, the victim had clearly taken a risk by engaging in a fight with the defendant. He was therefore aware that he himself could be attacked. In this sense, it is therefore fair to say that he had, to some extent, given up his right to respect of his integrity. As a result, it is difficult to say that he should be compensated for negative feelings, eg fear, humiliation, shame etc, that he brought upon himself (if he indeed experienced such feelings). However, the violence he faced after starting the fight was completely disproportionate to what he himself had done. This is like entering the boxing ring, ready for a boxing match, where you expect to be punched and hurt (and you consent to the most likely risk that this is going to happen), but, two minutes into the first round, your

opponent takes out a gun and shoots you in the leg. The boxer has of course not calculated with the risk of being met by completely disproportionate violence. He cannot complain about the bruises he first suffered during the game, but is of course entitled to damages for the gun shot injuries and compensation for the violation he suffered.

As a result of the disproportionate response from the defendant in the case (knife stabbing versus fist fight), the Supreme Court concluded that the victim suffered a serious violation. However, even if the threshold for what constitutes a serious violation is crossed, the victim's own behaviour can influence the assessment of compensation. The extent of compensation is, as mentioned above, about putting a value on something that cannot be valued in money. When trying to determine fair compensation, it is, from an objective point of view, a less serious violation when someone has taken a deliberate risk of being injured than when an attack is directed against a completely innocent passer-by. The level of compensation is, so to speak, assessed in relation to other violations, and thereby it would be unfair if the victim in the present case received the same amount in damages as someone who did not take a deliberate risk. **69**

Worth mentioning, finally, is that this is a matter of assessment of damages – not mitigation. The rule on adjustment for contributory negligence (ch 6, sec 1) is not applicable to compensation for criminal violations. Instead, as can be seen from these two cases, the victim's own contribution (through negligence or intent) is considered within the requirements of liability and assessment of damages. **70**

7. Personal Injury

The most important personal injury decisions are cited above: NJA 2021, 46 (see no 2 ff); NJA 2021, 746 (see no 46 ff); Supreme Court, 15 December 2021, case no T-863–21 (see no 58 ff). **71**

C. Literature

1. *Karolina Stenlund*, Rättighetsargumentet i skadeståndsrätten [The rights argument in Swedish tort law] (Iustus, Uppsala 2021) 586 pp

This doctoral thesis consists of a dogmatic review of the possibility of claiming damages based on the European Convention on Human Rights (ECHR), ch 2 of the Swedish Constitution (the Bill of Rights), the EU Charter, and the UN Convention **72**

on the Rights of the Child. The assessments of the conditions for liability, causation and compensation are discussed in detail. In addition, the author presents a so-called 'radiation effect' of human and civil rights to civil law.

73 Further, the historical development of human rights is also described. The international human rights discourse is set in relation to the development of Swedish tort law theory – with a specific focus on the 20th century. Tort law theory that provides remedies for constitutional violations and human rights' violations is a relatively new phenomenon in Sweden. The theory of negligence has traditionally been considered to define Swedish tort law. However, according to the author, this fundamental principle has been challenged by a human rights' inspired tort theory developed by case law. The author explains how violations of human rights have become a valid legal argument for claiming non-pecuniary damages in Swedish courts. Albeit 'natural' for lawyers stemming from a tradition where the guiding principle is the separation of powers' doctrine, this way of looking at rights in general has not been common in Sweden. This has, in part due to the membership of the EU, now changed.

74 Furthermore, the development of a general theory on compensation for human and civil rights' violations is analysed. The analysis is based on the theory of the 'double-sided nature' of the concept of rights as described by the American philosopher and Professor of Law, Duncan Kennedy.

2. *Jan Hellner*/*Marcus Radetzki*, Skadeståndsrätt [Tort law] (Norstedts Juridik, Stockholm 2021) 509 pp

75 This is a new edition (the 11th edition) of a standard work on tort law. The latest legislative changes and court cases have been included in the revised edition.

76 Its emphasis is on the rules on liability for personal injuries and property damage. The book goes into detail on issues of requirements for liability, principles for estimations of damages and rules on adjustment. There are special chapters on particular types of harm that fall under different legislation, such as traffic injuries, work injuries, patient injuries, product liability and environmental damage.

3. *Bertil Bengtsson*, Rättighetsansvar [Liability for rights' violations] (Norstedts Juridik, Stockholm 2021) 186 pp

77 The book, written by Sweden's 'grand old man' of tort law, covers a new type of tort liability that has gained in importance over the years: liability that is not

dependent on negligence or intent but violations of rights. To start with, damages were awarded by the Supreme Court based on the legal grounds laid down in the ECHR, but more recently a similar form of liability has been established in cases of violations of the Swedish Constitution (the Bill of Rights). The legislator has suggested a new rule codifying this development in court practice. The author also mentions that the Convention on the Rights of the Child can entail the same type of liability.

The book offers an overview of the somewhat fuzzy principles that characterise liability for rights' violations as well as a number of difficulties and opportunities in issues on liability that a further development of rights can bring about. **78**

4. *Rolf Johansson*, Rådgivaransvaret [Liability for advisors] (Iustus, Uppsala 2021) 278 pp

In this book, the author writes about the legal implications for advisors' – with a particular focus on lawyers and jurists – negligence in relation to their employer and liability for financial damage. Since there are no special rules on liability for advisors (general tort law rules apply), the author pays special attention to court practice where questions on liability have arisen. **79**

5. Articles

During the year, the Covid pandemic gave rise to an article by *B Flodgren* and *E Lindell-Frantz* on the right to insurance due to Covid-19-related interruptions in business operations, where the authors compare how this question is dealt with in Swedish and English law (Juridisk Tidskrift [JT] 2021/22, 3). **80**

U Bernitz presented in an article an overview on liability for damages under EU law. In his article, he discusses under which circumstances a violation of EU law is sufficiently clear and consequently gives rise to claims for damages, and when the State can be held liable for violations of EU legislation (JT 2020/21, 813). In a comment to a case that was presented by myself at the ECTIL Annual Conference in 2021 (NJA 2020, 115), *T Håstad* raises the question of what types of damage the case covers (JT 2020/21, 956). In addition, *H Andersson* has, as every year, provided his in-depth analysis of the Supreme Court cases delivered during 2021 online at infotorgjuridik.se. **81**