XXIX. Sweden

Vera Bolmgren

1. Supreme Court (Högsta domstolen) 9 June 2005, Nytt Juridiskt Arkiv (NJA) 2005, 462

A person was suspected of crimes in relation to his business. The investigation was carried out over a period of seven years before the suspect was ultimately acquitted. The prolonged investigation was in part a result of the complexity of the case, in part due to periods of inactivity by the prosecutors. The main question in the Supreme Court was whether there had been a violation of the right to a fair trial in due time according to art 6.1 of the European Convention on Human Rights (ECHR) and, if a violation was found, if the plaintiff was to be compensated for the non-pecuniary damage suffered. The Supreme Court found that there had been a violation of art 6.1 of the Convention and the compensation sum was set at € 10,000.

NJA 2005, 462 is the first case in which a direct application of the European Convention on Human Rights resulted in the establishment of tortious liability. Previously, it was generally assumed by the Swedish courts that only the European Court of Human Rights (ECtHR) could award damages for violations of the Convention. The Supreme Court deviated from this stance based on an interpretation of the right to an effective remedy according to art 13 of the ECHR as requiring the existence of remedies at the national level.

The judgment is often referred to as the starting point for the development of tort law as a remedy for violations of the ECHR in Sweden. In the years following NJA 2005, 462, the Supreme Court delivered several judgments on compensation in a Convention context. It was established that violations of articles other than art 6.1 ECHR could result in an award of compensation.[1] The basic principles of the assessment of compensation were also developed (NJA 2012, 211 I). Since 2018, tort liability and compensation for violations of the ECHR have been regulated in the Tort Liability Act (*Svensk forfattningssamling*, [SFS] 1972:207) ch 3 sec 4 and ch 5 sec 8.

[1] NJA 2007, 295; NJA 2007, 584.

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2. Supreme Court (Högsta domstolen) 5 April 2006, NJA 2006, 181

A fight broke out between two individuals outside of a discotheque. One of the individuals suffered a significant blow to the head by the other. The injury left the victim unconscious for two weeks. During this time, it was uncertain whether he would survive. The question posed to the Supreme Court was whether the victim's mother and brother were entitled to compensation for the psychological distress that the incident had caused them, even though the victim had not been killed. The Supreme Court ruled that the mother, but not the brother, be compensated with a sum of € 1,000.

NJA 2006, 181 brings to light the interplay between the legislator and the Supreme Court in Swedish tort law. The right to compensation for psychological distress when a close relative is killed was first established by the Supreme Court in NJA 1993, 41 I–II. In the judgment from 1993, the Supreme Court discussed whether close relatives could be entitled to compensation in cases where the victim had not been killed but severely injured. The Supreme Court found that such an expansion of the right to compensation should be decided by the legislator. However, the Supreme Court went on to expand the right to compensation in other ways, by establishing that not only intentional but also grossly negligent killing – though not negligent killing – could result in compensation (grossly negligent, negligent killing[2]).

The right to compensation when a close relative is killed was introduced into ch 5 sec 2 of the Tort Liability Act (SFS 1972:207) in 2002. In the preparatory works, it was stated that the intention was not to exclude compensation in cases where the victim is not killed but severely injured. However, the legislator found it difficult to construct a generally applicable rule for these cases. Therefore, the task of deciding on compensation in cases when the victim is not killed was left to the courts. NJA 2006, 181 is the first time that the Supreme Court decided to compensate close relatives of a victim who had been severely injured but not killed. The judgment was preceded by NJA 2003, 508, in which the possibility of compensation for a non-fatal incident was entertained but a restrictive approach upheld.

NJA 2006, 181 represents the culmination of a long-standing dialogue between the Supreme Court and the legislator. The legal development surrounding ch 5 sec 2 of the Tort Liability Act thereafter continued with

[2] Cf NJA 1996, 377; NJA 1999, 632.

regards to the compensation sum and the closeness of the relationship required between the victim and the plaintiff.[3] In 2022, a rule was also introduced in ch 2 sec 3a of the Tort Liability Act, aimed at compensating close relatives for the specific emotional shock, anger and despair typically caused by the loss of a relative through an intentional or grossly negligent act of a criminal nature.

3. Supreme Court (Högsta domstolen) 1 October 2008, NJA 2008, 915

Four individuals of foreign origin were discriminated against by being denied entry to a restaurant, while individuals with a typical Swedish appearance were allowed to enter. The individuals who were denied access had no interest in visiting the restaurant. Rather, the attempt to gain access was part of an investigation regarding the prevalence of discrimination in the restaurant industry. The pivotal question addressed by the Supreme Court was whether the fact that the discrimination had occurred in the context of an investigation aimed at discovering said discrimination should affect the compensation sum. The Supreme Court reasoned that the plaintiffs' lack of interest in visiting the restaurant was irrelevant for the compensation sum. However, the Supreme Court considered the risk of contributing to public perception that the discrimination legislation could be used for systematic enrichment. The Supreme Court therefore ruled that the compensation sum be reduced from € 1,500 to € 500 per plaintiff.

NJA 2008, 915 raises principled questions about the function of non-pecuniary damages, in particular as regards compensation in the case of discrimination and the relationship between tort law, public perception and society at large. The Supreme Court did not only take the prerequisites for compensation in the case of discrimination, the deterring purpose of compensation levels and the case law on compensation sums into account when deciding on the compensation amount. Rather, these factors were weighed against the effect that a compensation sum in accordance with the case law could have on the public perception of, and confidence in, discrimination legislation.

The judgment showcases how the legal justification of non-pecuniary damages is dependent on how the societal function is framed. The higher compensation sum of € 1,500 per plaintiff would have better served the deterring purpose of discrimination compensation, but the Supreme Court also took the broader societal context into account. In the same

[3] NJA 2006, 738; NJA 2017, 1208; NJA 2021, 46.

vein, the Supreme Court has emphasised the interconnected relationship between ever-changing societal norms and values and the compensation levels for certain types of non-pecuniary damage.[4] Turning to the continued development of discrimination case law, the deterring effect has had a prominent impact on how compensation sums are calculated and on the levels of compensation.[5]

4. Supreme Court (Högsta domstolen) 23 April 2014, NJA 2014, 323

A young man was stripped of his Swedish citizenship when it was uncovered that his father, who was a Swedish citizen, was in fact not his biological father. His mother was a British citizen. Four and a half years later, it was determined that the decision to strip the young man of his Swedish citizenship was unlawful. The decision was therefore overturned. The question before the Supreme Court was whether the plaintiff was to be compensated for the non-pecuniary damage suffered as a result of the violation of his right to citizenship according to the Swedish Constitution (*Regeringsformen* [RF] ch 2 sec 7). The Supreme Court emphasised the fundamental nature of the right to citizenship and the consequences that being stripped of it has for participation in society. For those reasons, and because the plaintiff had been stripped of his citizenship for a significant amount of time, the compensation sum was set at € 10,000.

NJA 2014, 323 was the first time that compensation was based on the Swedish Constitution. In the judgment, it was established that although the Swedish Constitution 'is primarily addressed to the legislature and government', tortious liability could arise from the infringement of a right as fundamental as the right to citizenship. The judgment thereby introduced the idea that the Swedish Constitution could be a potential basis for tort claims. An exception was also made from the fundamental principle in Swedish tort law that non-pecuniary damages require explicit support in the legislature.

The outcome in NJA 2014, 323 was confirmed in NJA 2018, 103, where a violation of the right to citizenship according to the Swedish Constitution ch 2 sec 7 once again resulted in compensation. Since 2022, tort liability and compensation for violations of the Swedish Constitution ch 2 are regulated in the Tort Liability Act.[6]

[4] NJA 2017, 938.

[5] NJA 2014, 499 I–II.

[6] SFS 1972:207, ch 3 sec 4 and ch 5 sec 8.

5. Supreme Court (Högsta domstolen) 5 December 2023, NJA 2023, 916

Elevated levels of Per- and polyfluoroalkyl substances (PFAS, commonly referred to as 'forever chemicals') were measured in the bodies of a large number of residents in a Swedish municipality. The cause was contaminated drinking water. The question that the Supreme Court addressed was whether the plaintiffs had suffered personal injury. The Supreme Court's conclusion was that the risk for future harm that the elevated levels of PFAS in the plaintiffs' bodies gave rise to did not constitute personal injury. However, the elevated levels of PFAS in the plaintiffs' bodies were considered to be bodily defects – a form of bodily deterioration. The Supreme Court therefore established that the plaintiffs had suffered personal injury.

NJA 2023, 916 brings to the forefront the effect of new potential harm sources on tort law theory. In Swedish tort law, the definition of personal injury requires the presence of a significant bodily defect. PFAS, once present in an environment, can linger and cause harm over a long period of time. This makes harm caused by PFAS difficult to merge with the framework and definitions of tort law. These difficulties are made no less apparent by the fact that NJA 2023, 916 was preceded by ten years of investigation and court proceedings, including a Supreme Court judgment[7] on the applicability of the relevant tort legislation.

The distinction made by the Supreme Court between personal injury defined as a risk for future harm from elevated PFAS levels and the elevated PFAS levels themselves will likely contribute to the Swedish academic discourse on the concept of harm within tort law. Without doubt, the judgment will hold significance for potential future tort claims based on PFAS exposure.

[7] NJA 2018, 475.