



SUPREME COURT OF NORWAY

J U D G M E N T

given on 8 June 2022 by the Supreme Court composed of

Justice Ragnhild Noer
Justice Knut H. Kallerud
Justice Per Erik Bergsjø
Justice Cecilie Østensen Berglund
Justice Knut Erik Sæther

HR-2022-1132-A, (case no. 22-000081SIV-HRET)
Appeal against Gulating Court of Appeal's judgment 4 November 2021

A represented by guardian

(Counsel Linda Egeland)
(Assisting counsel: Carl Aasland Jerstad)

v.

The State represented by the Patients' Injury
Compensation Board

(Counsel Svein Åge Bergset)

- (1) Justice **Bergsjø**:

Issues and background

- (2) The case concerns the measure of compensation for medical and socio-medical expenses in a patient injury case. The victim lives in the United States, and the question is which principles should govern the calculation in such an event.
- (3) A was born at the Women’s Clinic at Haukeland University Hospital in Bergen on 29 August 2012. Due to a delayed delivery and a lack of oxygen, she sustained serious brain damage. Her mother is a Norwegian national, while her father is American. A has both Norwegian and United States citizenship. Her parents met in Texas in 2011, where her mother worked at the time. They moved to Norway in July 2012 – a couple of months before the delivery – and into a flat that her mother owned in Bergen. As found by the Court of Appeal, the parents came to Norway “with the purpose of settling here”. The family moved back to the United States in November 2012, and have lived in Texas since.
- (4) On 19 December 2013, the Norwegian System of Patient Injury Compensation (NPE) decided that A was entitled to compensation under the Patient Injury Act. In NPE’s decision of 28 January 2016, she was awarded a total compensation of NOK 10 052 720. The amount is distributed as follows:
- | | |
|------------------------------------|----------------|
| “Standard compensation, children | NOK 3 602 720 |
| Incurred nursing and care expenses | NOK 200 000 |
| Future nursing and care expenses | NOK 4 400 000 |
| Incurred expenses | NOK 450 000 |
| Future expenses | NOK 350 000 |
| Car/transport | NOK 50 000 |
| Home adjustments | NOK 1 000 000” |
- (5) The standard children’s compensation was based on a permanent 100 percent disability rating. In the decision, the nursing expenses were based on an estimated annual loss of NOK 150 000. A was unsuccessful in claiming that the calculation had to reflect the level of expenditure in the United States, and thus no compensation was awarded for purely medical expenses.
- (6) The parents appealed on her behalf to the Patients’ Injury Compensation Board, which made a decision on 22 February 2018. The Board estimated the future annual nursing expenses at NOK 160 000 and therefore increased the compensation by barely NOK 290 000. Also in the appeal, the victim was unsuccessful in claiming that the compensation had to reflect the United States level of expenditure.
- (7) In a writ of summons of 23 August 2018, A represented by her guardians claimed extra compensation for incurred and future medical and socio-medical expenses. In addition, she claimed coverage for a specially adapted car, for the obtaining of a “Life Care Plan” and for legal fees incurred during the appeal. On 15 May 2020, Bergen District Court ruled as follows:

- “1. A represented by guardians is awarded compensation from the State represented by the Patients’ Injury Compensation Board for socio-medical expenses of

NOK 200 000 annually from and including 2015. A deduction is made for compensation already paid under this item. Payment will be made within two weeks of the service of the judgment.

2. Costs in the District Court are not awarded.”

- (8) The judgment awarded extra compensation of NOK 280 000 for already incurred socio-medical expenses and NOK 1 114 373 including tax burdens for future socio-medical expenses. The District Court assumed that A would have received public benefits covering her health care needs if the family had stayed in Norway. In the District Court’s view, the increased expenses incurred due to the moving to the United States were not recoverable. Therefore, A was unsuccessful in claiming that the compensation had to reflect the level of expenditure in the United States.
- (9) First, A appealed directly to the Supreme Court, but the Supreme Court’s Appeals Selection Committee did not grant leave to direct appeal. She then appealed to Gulating Court of Appeal challenging the findings of fact and the application of the law. The State represented by the Patients’ Injury Compensation Board brought a derivative appeal. On 4 November 2021, the Court of Appeal ruled as follows:
- “1. The State represented by the Patients’ Injury Compensation Board is to pay compensation of NOK 165 000 for incurred expenses to A represented by guardians within two weeks from the service of this judgment. The appeal is otherwise dismissed.
 2. The derivative appeal is dismissed.
 3. Each party carries its own costs in the District Court and in the Court of Appeal.”
- (10) Unlike the District Court, the Court of Appeal accepted the claim of NOK 90 000 for the “Life Care Plan” and NOK 75 000 for legal fees incurred during the appeal. However, the Court of Appeal agreed with the District Court that the compensation for medical and socio-medical expenses had to be fixed as if the victim lived in Norway. The Court of Appeal placed decisive emphasis on the fact that she could have stayed in Norway and received public welfare benefits here.
- (11) In aggregate, an amount in excess of NOK 12 million has been paid out in the case. From this amount, approximately NOK 6.3 million constitutes compensation for incurred and future socio-medical expenses.
- (12) A represented by guardians has appealed to the Supreme Court, challenging the findings of fact and the application of the law. On 27 January 2022, the Supreme Court’s Appeals Selection Committee granted leave to appeal with regard to the application of the law.

The parties’ contentions

- (13) The appellant – *A represented by guardians* – contends:

- (14) The Court of Appeal commits an error in law in concluding that the compensation must be fixed as if the victim lived in Norway. *Principally*, she is entitled to full compensation for incurred and future expenses in the United States according to ordinary principles of tort law. Compensation is to be paid for the victim's individual loss based on the factual situation at the time of settlement. This applies irrespective of place of residence and nationality. The victim does not receive Norwegian welfare benefits, and the compensation can thus not be fixed as if she were. The compensation cannot be limited to the Norwegian level of expenditure based on the principle that compensation may only be awarded for necessary and reasonable expenses, nor is there a basis for applying other limitation criteria, such as remoteness/foreseeability (*adekvans*), reduction of the compensation amount (*lemping*) and the victim's contribution.
- (15) Provisions in the Constitution, the European Convention on Human Rights (ECHR), the UN Convention on the Rights of the Child (the Children's Convention), the UN Convention on Civil and Political Rights (CCPR) and the UN Convention on the Rights of Persons with Disabilities (CRPD) constitute interpretative factors and legal hindrances. A rule that discriminates the victim based on nationality or reduced functional capacity will be a violation of the Constitution, the Anti-Discrimination and Equality Act, the CCPR and the EEA Agreement.
- (16) *In the alternative*, A is entitled to full compensation due to such "extraordinary circumstances" that may form a basis for extra compensation according to case law. Here, it must be noted that neither Norwegian health care nor medical services are available to her. The assessment must be made in the light of her rights as seriously disabled under the CRPD.
- (17) A asks the Supreme Court to rule as follows:
- "1. The Court of Appeal's judgment is set aside.
 2. The State represented by the Patients' Injury Compensation Board is to pay costs in all instances."
- (18) The respondent – *the State represented by the Patients' Injury Compensation Board* – contends:
- (19) The Court of Appeal has not committed any error in law. A has been awarded full compensation. Compensation for additional expenses must be measured based on the benefits she would have received if the family had stayed in Norway, not on the level of expenditure in the United States. The compensation must be a supplement to these benefits.
- (20) The starting point is that A is entitled to full and individual compensation in line with general rules on the measure of compensation. However, "full compensation" is a legal term, and due regard must be had to statutory and non-statutory limitation rules. The extra costs of moving to the United States exceed what is considered "necessary and reasonable", and are thus not recoverable. The crucial factor is that the victim moved voluntarily and did thus not fulfil her duty to mitigate the loss by applying for public benefits. Furthermore, there are no "extraordinary circumstances" in this case to suggest a different solution than that reached by the Court of Appeal. The Court of Appeal's application of the law is supported by policy considerations and a firm and clear practice by the Patients' Injury Compensation Board.
- (21) The part of the loss owing to the moving to the United States is in any case not foreseeable (*ikke adekvat*). Alternatively, the rules on the victim's contribution and mitigation in sections

5-1 and 5-2 of the Compensatory Damages Act must also lead to preclusion of further claims for compensation.

- (22) The provisions in the Constitution and various conventions invoked by the victim cannot give any other result. Since A lives in the United States, neither the EEA Agreement nor the ECHR is relevant. As for the other norms invoked, they constitute neither hindrances nor significant interpretive issues.
- (23) The State represented by the Patients' Injury Compensation Board asks the Supreme Court to rule as follows:
- “1. The appeal is dismissed.
 2. The State represented by the Patients' Injury Compensation Board is awarded costs in the District Court, the Court of Appeal and the Supreme Court.”

My view

The issue and the facts of the case

- (24) As mentioned, the case concerns the measure of compensation for additional expenses in a patient injury case. Section 18 of the Patient Injury Act sets out that anyone who claims compensation under the Act may bring “the case” before the courts once a final decision has been made by the Patients' Injury Compensation Board. This means that the courts have full jurisdiction to review the claim in itself, see the judgment in Rt-2011-1238 paragraph 21 with a reference to the judgment in Rt-2006-1217 *Angiography* paragraph 29.
- (25) A sustained serious brain damage due to medical negligence during delivery, making her dependent of extensive nursing, care, health services, equipment etc. She is 100 percent medically disabled, and is expected to have a life-long need of supervision day and night. In the District Court's description of the extent of the injury and the need of care, which the Court of Appeal supports, it is also set out that she has reduced cognitive functioning, problems with managing day-to-day life and difficulties with learning, language and communication. When the District Court handed down its judgment, A was seven years old. Her functioning was nonetheless “at infant level mentally, and mostly motorically”.
- (26) If the family had stayed in Norway after the delivery, a substantial part of the expenses for treatment, nursing and care would have been covered by the public welfare system, see provisions in sections 5 and 6 of the National Insurance Act and chapter 3 of the Health and Care Services Act. However, they moved to the USA, where no such system exists. The parents therefore have to cover all expenses, either by own funds or via insurance. The claim for supplementary compensation relates to these extra costs.
- (27) The Court of Appeal dismissed the claim. In its reasoning, the Court of Appeal states:
- “As mentioned, the victim cannot in a situation where he or she is regarded as resident in Norway with access to satisfactory welfare benefits here freely choose to stay in another country, with the consequences this has for the size of the claim for compensation. On the contrary, in the Court of Appeal's view, it must be reasonably expected that the victim, also in a situation like the present, makes use of public welfare benefits to which he or

she has access. This follows from the Norwegian basic principle that the compensation rules are subsidiary and only meant to cover the loss that the victim incurs beyond what the public benefits cover.”

- (28) The question is whether the Court of Appeal has applied the law correctly. I will first present some principles under tort law.

Tort law principles

- (29) According to section 2 subsection 1 of the Patient Injury Act, patients and others who have suffered a loss due to patient injury are entitled to compensation when the injury is caused, among other things, by a failure to provide proper health care, see (a). Section 4 subsection 1 first sentence sets out that “the measure of loss, the victim’s contribution etc.” are regulated by the Compensatory Damages Act and “ordinary rules of tort law”. The exceptions in the second sentence are not relevant here.
- (30) This implies that compensation must be measured in accordance with section 3-1 subsection 1 of the Compensatory Damages Act, which reads:
- “Compensation for personal injury shall cover loss incurred, loss of future earnings and expenses which the personal injury is presumed to cause to the victim in future.”
- (31) The expression “loss incurred” comprises additional expenses incurred.
- (32) Subsection 3 provides rules on reductions in compensation amount. According to the first sentence, the compensation must be reduced “by any social security benefits and benefits under an employer’s or professional pension scheme to the extent the person liable for compensation has paid the premium” – the “mandatory deduction rule”. The second sentence, often referred to as the “optional deduction rule”, sets out that regard may be had to any insurance benefits and financial support that the victim has obtained or will obtain as a result of the injury.
- (33) The ordinary rules on the victim’s contribution and limitation of the compensation also apply in the patient injury cases. According to section 5-1 of the Compensatory Damages Act, the compensation may be reduced or be lost if the victim has contributed to the injury. The decision must be based on an individual assessment of reasonableness. It is considered contribution if the victim has failed “to limit the injury in his or her best capacity”, see section 5-1 (2). The compensation may be limited under section 5-2 if the court finds that the liability will be “unreasonably burdensome for the tortfeasor”.
- (34) As a starting point, the victim is entitled to “*full compensation* – he or she is to be placed in the same economic position as if the injury had not occurred. This principle was established in the Tort Law Committee’s Official Report 1971: 5 page 38, and has later been followed up in preparatory works and case law. In the Supreme Court judgment in Rt-1993-1524, it is stated that “the core of tort law is that the victim is not to be economically worse off than if the injury had not occurred”. However, it is also stressed that “full compensation” is primarily a legal term and not an “exact economic term”. This has to do with the fact that the compensation will be measured on an individual basis, and that the liability may be limited in various ways. I will soon return to these limitations.

- (35) As mentioned, the compensation must be reduced by any public benefits, see section 3-1 subsection 3 first sentence of the Compensatory Damages Act. The compensation thus becomes a supplement to the public benefits. This *supplement principle* is applicable also to the measure of compensation for additional expenses. In the Supreme Court judgment in Rt-2009-425 *Brain tumour II* paragraph 53, it is stated in line with this that compensation for “costs of nursing and care will be a supplement to public benefits”.
- (36) In other words, the aim is that the victim’s individual loss is fully recovered by the aggregate of compensation and public benefits. The size of the loss must be estimated based on the factual situation at the time of settlement, which in this case is the date of the judgment. Losses incurred up to the time of settlement are recovered, while future losses must be estimated based on the likely development, see for instance the judgment in Rt-2006-684 *Tinnitus* paragraph 30.
- (37) I have already mentioned that the liability may be limited in various ways. The compensation amount may under section 5-1 of the Compensatory Damages Act be reduced or lost if the victim has contributed to the injury, and limitation may be relevant under section 5-2. Moreover, it is generally accepted law that liability is limited by the remoteness doctrine (*adekvanslæren*). Simply put, this means that the primary injury and the loss cannot be too remote from the injurious event.
- (38) The Patients’ Injury Compensation Board has asserted all of these limitation criteria in support of its view, but has not emphasised them. Instead, the Board’s arguments are based on the principle that only necessary and reasonable additional expenses may be compensated. I agree that this is the correct approach in the case at hand. Limitation according to section 5-2 is not relevant for several reasons. Also, I cannot see that an increased loss incurred due to the moving to a country to which the victim is as closely connected as in this case was unforeseeable to the tortfeasor and thus a breach of the remoteness doctrine. According to section 5-1 (2), it is considered contribution if the victim has failed to attempt to mitigate the loss. However, to which I will soon return, the duty to mitigate is also incorporated in the expression “necessary and reasonable”. Hence, in my view, section 5-1 does not extend beyond the limitation that only necessary and reasonable expenses are recoverable, and I will not discuss the other bases for limitation. Instead I will turn to discussing the recoverable expenses and how the compensation may be limited based on the implications of “necessary and reasonable”.

Compensation for additional expenses and the limitation of the same

- (39) I line with what I have already said, additional expenses caused by an injurious event should in principle be fully compensated. However, a doctrine has developed that only the *necessary and reasonable expenses* are recoverable under tort law. Moreover, the compensation is to be a supplement to the public benefits. Additional expenses may come in various forms. This case concerns expenses for treatment, nursing and care, and I will therefore concentrate on these categories in my further discussion.
- (40) I will base myself on the Supreme Court’s judgment in Rt-1993-1547, which concerned compensation to a man that sustained serious brain damage after a car accident. On pages 1558–1559, Justice Gjølstad discusses the compensation for future additional expenses for care services. She starts by stating that it is a “generally acknowledged view” that “a claim for

compensation for expenses must be limited to what must be considered necessary and reasonable”. After a presentation of preparatory works and provisions in the Compensatory Damages Act, she continues:

“Health and social security law aims at ensuring the population necessary and proper health care and promoting welfare and good social conditions. Based on the principle that the compensation must be a supplement to public benefits, I find that the public health services must determine which expenses are reasonable and necessary and thus recoverable under tort law.”

- (41) Justice Gjølstad continues by stating that the supplement principle may only be abandoned in “extraordinary circumstances”. Moreover, it is a precondition that the expenses are “reasonably balanced against what may be obtained through a different system than the public health services.”

- (42) As for the expenses incurred in the case at hand, the public services thus determine which are necessary and reasonable. The view is further developed in the Supreme Court judgment in Rt-1996-958, which concerned compensation to a girl who sustained serious injuries during delivery. On page 966, Justice Coward bases herself on the mentioned judgment from 1993. Then she states:

“When it comes to treatment and care benefits exclusively for health purposes, I trust that the public benefits represent the necessary and reasonable level also in terms of compensation. When it comes to benefits whose purpose is to provide more independence, freedom and well-being in everyday life, I believe that a somewhat higher standard is appropriate under tort law, i.e. so that expenses are covered beyond what is covered by public assistance and benefit schemes. However, the necessary and reasonable expenses limitation still applies, and a line must be drawn towards what is covered by the standard compensation for permanent medical disability.”

- (43) These starting points are followed up in several Supreme Court judgments. I confine myself to mentioning that in Rt-2002-1436, which concerned a claim for compensation from a woman who was hit by a truck when she was eleven years old. She sustained permanent paralysation from her shoulders and down, while she had to amputate her left leg. Justice Bruzelius states on page 1442:

“What is to be measured is thus primarily a supplement to the public benefits to ensure the victim more independence, freedom and well-being.”

- (44) Against this background, I find that compensation should not, as a starting point, be paid for benefits entirely related to *health*, such as treatment costs. Here, the benefits are considered to be at a necessary and reasonable level. However, exceptions are possible. I refer to the judgment in Rt-2003-1358 *Psychologist*, where the Supreme Court decided claims for compensation from three men who had been abused by a psychologist. The Supreme Court awarded compensation for non-reimbursable treatment costs, see paragraph 44 in particular. Case law also shows that compensation is awarded as a supplement to public benefits to ensure more independence, freedom and well-being – *socio-medical needs*. It is only the necessary and reasonable expenses for the fulfilment of such needs that are compensated. Finally, it is a precondition that purely *social needs* are covered by the compensation for permanent medical disability.

- (45) The requirement of “necessary and reasonable” expenses entails a *duty to mitigate the loss* – the victim must attempt to limit the damage and loss as much as possible. This includes a duty to make use of public benefits where possible. I refer to section 44 of the aforementioned *Psychologist* judgment, where Justice Oftedal Broch puts it as follows:

“The victim has a general duty to limit his loss. This must imply that he, to the extent possible, makes use of public – reimbursable – health services.”

- (46) The principles I have now presented have developed through cases where the victim has lived in Norway and thus been entitled to Norwegian welfare benefits. The judgments do not discuss the measure of compensation where the requirement of first making use of public benefits is not applicable. I will now assess whether the sources of law give guidance on how the calculation in cases where the victim – as in this case – does not receive Norwegian welfare benefits.

Measure of compensation in cases connected to a foreign country

- (47) The parties have invoked various sources of law to shed light on the measure of compensation when the victim lives abroad and does not receive Norwegian welfare benefits. I will start with the Supreme Court judgment in Rt-2014-892 *Kenya*. The case concerned the measure of aggravated damages to surviving relatives after a grossly negligent car homicide. Two of the surviving relatives lived in Kenya, and the question was whether they were entitled to a lower compensation amount than the others because they lived in a low-cost country. The Supreme Court found that also the surviving relatives in Kenya were entitled to the normative compensation amount of NOK 125 000. In other words, although they lived abroad, they received aggravated damages at “Norwegian level”.
- (48) In my view, the ruling gives no guidance to the case at hand, which concerns the measure of compensation for economic loss. Aggravated damages have distinctive characteristics and partially justified by other factors than the remaining compensation items. Although the compensation element in time have become more dominant in the measure of aggravated damages, such damages still have an “ideal function as an expression of a strong social disapproval”, see paragraph 23 of the judgment with a reference to the judgment in Rt-2011-769 paragraph 21.
- (49) The judgment in Rt-1997-390 concerned the measure of compensation to children for the loss of a care person. A Danish married couple was involved in a serious traffic accident in Norway. The man died, while the woman was seriously injured. The deceased left behind four children, two of whom were in the couple’s joint care. At the time of the accident, the couple lived in Norway, but the woman moved back to Denmark shortly afterwards together with the children. There, she received various welfare benefits. The question was whether, and possibly how, these benefits should be deducted from the compensation. The Supreme Court found that the Danish benefits had to be assessed according the “optional deduction rule” in section 3-1 subsection 3 second sentence of the Compensatory Damages Act, and not the “mandatory deduction rule” in the first sentence. The judgment may be considered to reflect the principle that the compensation must be fixed based on the victim’s factual situation in his or her country of residence. However, as it concerned a different issue than that at hand, it gives no clear answers.

- (50) The victim has invoked Borgarting Court of Appeal's judgment LB-2010-136899, contending that it points in the same direction as the mentioned 1997 judgment. The Court of Appeal's judgment concerned punishment for violation of section 224 of the Penal Code 1902 on human trafficking and compensation to the two Kenyan women who had been exploited. It had been established that one of the women wished to move back to Kenya, and the Court of Appeal measured the compensation for medical treatment based on the factual situation there.
- (51) The Patients' Injury Compensation Board, in turn, has referenced the judgment in Rt-1999-1967, where the Supreme Court dismissed the claim for compensation for medical treatment abroad. The victim lived in Norway and received Norwegian welfare benefits. The Supreme Court found, in line with previous rulings, that the public services must be deemed adequate and appropriate. I cannot see that the judgment gives guidance in cases where the victim lives abroad and does not receive welfare benefits in Norway.
- (52) In Norwegian Official Report 2011: 16 *Standard personal injury compensation*, a Committee of Experts proposed rules on standard measure of compensation. In section 4.10, the Committee discusses the situation for victims without permanent residence in Norway – "the visiting victim". The following is set out in section 4.10.1 on page 78:
- "Persons who are injured during a short stay in Norway will not be covered by the Norwegian social security system in the ordinary manner, see the connection requirements in chapter 2 of the National Insurance Act, particularly that of 'residence in Norway' in section 2-1. Since victims within this group do not receive Norwegian benefits in the ordinary manner, they are in a special position as to how their compensation is measured. Particularly where the procedure is standardised with automatic deduction for benefits received, it becomes necessary for various reasons to adjust the rules to the relevant group."
- (53) I also mention the discussion of standard loss of income compensation for adults in section 5.6.6.2 on page 163. The Committee establishes that EEA law gives little leeway to make rules that differentiate between Norwegian nationals and visiting victims from EEA countries. Its aim was to prepare a scheme that "guarantees the victim full compensation regardless of country of residence and regardless of income earned in that country". The Committee continues:
- "This superior goal requires that the calculation is adjusted to existing differences between the victims from various nations. On this point, it is particularly relevant which coverage the individual victim receives."
- (54) The Committee emphasises that visiting victims who receive standard compensation risk receiving less than full compensation:
- "This is because the standard level requires that the victim receives benefits at the Norwegian level. If the coverage in the country of residence is lower than in Norway, the victim will not receive full compensation."
- (55) The discussions are directly linked to a proposal of standard measuring rules. They also concern compensation for loss of income, not for additional expenses. I believe nonetheless that the statements are relevant to the case at hand. The Committee finds that the compensation to victims resident abroad must be measured based on the situation in the

relevant country. If they do not receive welfare benefits corresponding to the Norwegian benefits, the calculation cannot be based on the opposite.

- (56) The Patients' Injury Compensation Board has a different approach to these questions, also in cases other than ours. Several decisions have been presented on compensation awarded to victims that have moved abroad and therefore not received welfare benefits at the same level as in Norway. The calculation is nonetheless based on the Norwegian compensation level; in other words, as if the victims lived here at the time of settlement and received Norwegian benefits. The Board's practice appears to be consistent; it has maintained its view for some years. Although the Board has not made many such decisions, they should be given status as sources of law, see the judgment in Rt-2006-1217 *Angiography* paragraph 38.
- (57) On the other hand, the Board's practice in this area has not developed from a fundamental and principled ruling, which, in my view, reduces its significance. In the first decision on this issue – PSN-2009-13 – the reasoning is very brief. The Board merely states that the contention that benefits received in England are lower than in Norway cannot be given independent significance “as it is the Norwegian compensation level that must be applied”. It is also pointed out that the family was not forced to move and that the victim “must in principle take the consequences of his or her choices”. Although the reasoning in subsequent decisions is somewhat more elaborated, the decisions seem to be built on the decision from 2009.
- (58) This issue is hardly addressed at all in legal literature. Yet, I mention Morten Kjelland's discussion in Syse and others, *Patient Injury Law*, 2011 page 406–407, in which he comments on the issue and emphasises that it “raises a number of intricate issues on the points of intersection between tort law, welfare law and international law”. When discussing the Patients' Injury Compensation Board's decision in PSN-2009-13, he cannot “rule out” that a choice to move abroad may be “reasonable”, for instance due to strong bonds to the country. I read this to mean that he accepts that in such cases, compensation should be awarded based on the factual situation in the relevant country.
- (59) The sources give no clear answers to the question of how the compensation is to be measured when the victim lives abroad at the time of settlement and thus does not receive Norwegian benefits. Nonetheless, to me they suggest that the factual situation – at least at the outset – is decisive when measuring the compensation: It must be established which benefits the victim receives in his or her country of residence, and the individual loss must be estimated on those grounds. The calculation cannot be based on Norwegian benefits that the victim does not receive. The Patients' Injury Compensation Board practises a different legal approach.
- (60) However, I am reluctant to formulate any general guidelines based on the sources I have presented. The reasons why a victim does not receive Norwegian welfare benefits may vary. There may also be various reasons why a victim who lives in Norway and is entitled to such benefits nonetheless moves abroad. Policy considerations presented by the parties, including that of preventing speculation, and social considerations point in different directions. In addition, our international obligations may disturb the overall picture, as pointed out by the Standardisation Committee in Norwegian Official Report 2011: 16. However, the signals I perceive from the sources form the background to my individual assessment of the Court of Appeal's application of the law.

The application of the law in the case at hand

- (61) A now lives in the USA and does not receive Norwegian welfare benefits. It seems to be established that she will continue to live there in the years to come. The ordinary measure principles imply at the outset that she should be awarded full compensation based on the factual circumstances and the likely development at the time of settlement. This would imply that the compensation must be based on the level of costs in the USA instead of being a supplement to the Norwegian welfare benefits.
- (62) The Court of Appeal has nonetheless – in line with The Patients’ Injury Compensation Board’s decision – measured the compensation based on the welfare benefits to which A would have been entitled if she had lived in Norway with her family. The Court of Appeal has emphasised that the family moved voluntarily, and that the victim must therefore carry the financial consequences. The question is whether this is the correct application of the law.
- (63) I find, as mentioned, that the issue is whether the claim for extra compensation should be precluded because the expenses exceed what is necessary and reasonable. This also requires an assessment of whether the victim has fulfilled her duty to mitigate the loss.
- (64) A sustained a very serious injury with large consequences for her and her family’s life situation. The negligence is described as “gross” in a request for administrative reaction towards the chief physician from the County Governor of Hordaland to the Norwegian Board of Health Supervision. The Board found negligence, and negligence was also acknowledged under a settlement agreement on aggravated damages between the victim and Health Bergen HF.
- (65) I also strongly emphasise the family’s bonds with the United States, bonds that existed already at the time of the injury. A’s parents came to Norway only shortly before the childbirth. As mentioned, both A and her father are United States nationals. The bonds to the United States have only grown after the injury occurred: The family moved to the United States only a couple of months after the childbirth, and A has now lived there for almost ten years. The family moved long before it was clear that a basis for compensation existed, and clearly without envisaging the consequences under tort law.
- (66) It is true that the victim – as part of the duty to mitigate the loss – must normally carry the financial consequences of not making use of the public health services. However, as I have pointed out, this principle is developed for cases where the victim lives in Norway. I cannot see that it reaches to an extent where the victim must carry the financial consequences of moving abroad when the bonds to the other country are as strong as in this case. Moving is for many a normal part of life, and in the case at hand, it is not difficult to understand the family’s choice.
- (67) The parties agree that the compensation awarded does not cover A’s needs in the United States. Strong human considerations therefore suggest that the compensation must be based on the level of expenditure there.
- (68) Against this background, the limitation that only necessary and reasonable expenses may be compensated, cannot justify the Court of Appeal’s conclusion. The judgment is based on an error of law and must be set aside.

- (69) The Court of Appeal's new measure of compensation must be based on the level of expenditure in the United States. The compensation for additional expenses for treatment, nursing and care is not to be considered a supplement to the public benefits in Norway. However, the term "necessary and reasonable" also contains a standard of needs, which must also be considered in the new hearing in the Court of Appeal.

Conclusion and costs

- (70) The Court of Appeal's judgment is based on an error in law and must be set aside.
- (71) The appellant is successful and thus entitled to compensation for costs under section 20-2 subsection 1 of the Dispute Act and the Supreme Court ruling HR-2020-636-U paragraphs 14–16. The Court of Appeal is to measure the compensation once more, and determination of costs in the lower instances is therefore contingent upon the outcome of parts of the action that have not been decided, see section 20-8 subsection 3 of the Dispute Act. Costs are therefore only awarded in the Supreme Court.
- (72) The appellant has applied for legal aid "in the event costs in the Supreme Court are not awarded or are not awarded in full". Legal aid must therefore be understood to be contingent upon costs not being awarded. The appellant's costs must therefore be compensated and measured in the ordinary manner.
- (73) In the Supreme Court, a claim for legal fees has been submitted of NOK 1 118 000 excluding VAT, distributed on NOK 682 000 to Counsel Egeland and NOK 436 000 to Counsel Jerstad. The hourly rate for both is NOK 2 000. Fees to two trainee advocates and VAT are added to this, which gives a total claim of NOK 1 445 000.
- (74) According to section 20-5 subsection 1 first sentence of the Dispute Act, full compensation for costs cover "all necessary costs incurred by the party in relation to the action". In assessing whether the costs have been necessary, the court must consider whether it was reasonable to incur these costs "in view of the importance of the case". This means that a proportionality assessment must be carried out, see for instance the Supreme Court ruling HR-2020-611-A paragraph 67. The Patients' Injury Compensation Board has not objected to the claim, but it must nonetheless be reviewed, see section 20-5 subsection 5.
- (75) I recognise that this case has required a lot of work. It has raised complex and principled issues, and the case undoubtedly has a large impact on the appellant. I also emphasise the relatively conservative hourly rates. On the other hand, counsel have represented the victim also in the previous instances, which must have facilitated the preparations considerably, see HR-2020-1515-U paragraph 25 with further references. I also question whether it has been necessary to put so much effort into the convention issues. Also, it is likely that the use of two advocates may have increased the costs, see paragraph 26 of the mentioned order by the Supreme Court's Appeals Selection Committee. Overall, I have concluded that the claim exceeds what is necessary. The legal fees in the Supreme Court are set at NOK 900 000 including VAT.
- (76) In addition, compensation is awarded for expenses in the Supreme Court of NOK 15 757. A court fee of NOK 32 373 must also be added. The expenses thus amount to NOK 48 130, which gives total legal costs of NOK 948 130.

(77) I vote for the following

J U D G M E N T :

1. The Court of Appeal's judgment is set aside.
2. The State represented by the Patients' Injury Compensation Board will pay costs in the Supreme Court to A represented by guardians of NOK 948 130 within two weeks of the services of the judgment.
3. The costs ruling in the District Court and the Court of Appeal is postponed to the ruling that finalises the case.

(78) Justice **Sæther:** I agree with Justice Bergsjø in all material respects and with his conclusion.

(79) Justice **Østensen Berglund:** Likewise.

(80) Justice **Kallerud:** Likewise.

(81) Justice **Noer:** Likewise.

(82) The Supreme Court gave the following

J U D G M E N T :

1. The Court of Appeal's judgment is set aside.
2. The State represented by the Patients' Injury Compensation Board will pay costs in the Supreme Court to A represented by guardians of NOK 948 130 within two weeks of the services of the judgment.
3. The costs ruling in the District Court and the Court of Appeal is postponed to the ruling that finalises the case.