SOCIAL INSURANCE AND TORT LIABILITY IN SWEDEN

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The relationship between social insurance and tort liability is at present being discussed in many countries, largely because of the desire to provide better compensation to the victims of automobile accidents than can be conferred under traditional tort rules. At first the question that attracted most attention was the impact of social insurance on tort damages. Should insurance benefits be deducted from tort damages and, if they are so deducted, should the social insurer be entitled to exercise subrogation against the tortfeasor?[1] With the growing importance of social insurance, however, other and more fundamental issues have come into the forefront of attention. This is particularly the case in a country like Sweden, where social insurance is now of paramount importance for all losses due to illness or personal accidents. Sweden maintains—besides unemployment insurance, which in the present context can be disregarded—not only industrial injuries insurance, which corresponds to the earlier workmen's compensation, but also a scheme of national insurance which comprises national health insurance, national basic pensions, and national supplementary pensions related to the previous earnings of disabled or deceased persons.[2] On the whole, if a Swedish citizen suffers an injury, whether caused by tort or not, social insurance will cover the main economic loss. One can no longer

[1] The writer discussed this question in *Försäkringsgivarens regressrätt* (The Insurer's Right of Subrogation), *Uppsala Universitets Årsskrift* 1953: 3 (Uppsala 1953); see the English summary pp. 258 f., 269. For Anglo-American law, the author would draw particular attention to Fleming James Jr, "Social Insurance and Tort Liability: The Problem of Alternative Remedies", *New York University Law Review*, vol. 27 (1952), pp. 537 ff. Cf. F. V. Harper & F. James, *The Law of Torts*, vol. 2, Boston 1956, pp. 759 ff.

[2] Industrial injuries insurance (*yrkesskadeförsäkring*) is regulated by the Lag (1954: 243) om yrkesskadeförsäkring. National insurance (*allmän försäkring*) is regulated by the Lag (1962: 381) om allmän försäkring. Some information regarding the Swedish system of reparation for personal injuries is given by the writer in "Analysis of the Swedish Auto Accident Compensation System", in *Comparative Studies in Automobile Accident Compensation* (Department of Transportation, Automobile Insurance and Compensation Study), 1970.

assume that the main functions of tort liability are unchanged by the fact that social insurance also covers the losses which give rise to claims in tort.

Moreover, a new attitude toward compensation for personal injuries is arising. The whole system of reparation is under review, and proposals for replacing at least the main part of tort liability for personal injuries by social insurance and private first-party insurance are being seriously discussed. It is recognized that no such radical change can take place in the near future except after further development of social insurance or of cheap forms of private insurance, principally collective forms of accident and sickness insurance.[3] In these circumstances, we must face the general issue how far social insurance can assume the functions now traditionally associated with tort law and how social insurance should be adjusted to help fulfil these functions.

The question that initially drew attention to the relationship between tort liability and social insurance, i.e. the problem of deducting benefits and permitting subrogation, no longer presents practical problems in Sweden. It has been settled in a way which leaves little scope for further discussion of technical rules. All benefits derived from social insurance are to be deducted from tort damages, without any subrogation against the tortfeasor.[4] The reasons for choosing this solution are simple.[5] When the rule was fixed, attention was concentrated on the practical issue of deciding the victim's right to compensation and the tortfeasor's liability in each case of injury. It is a principle of long standing in Swedish law that benefits from social insurance—at least those of any practical importance—are to be deducted from tort damages, and this principle was retained. More doubt was felt about subrogation. This had existed earlier in some cases, but there had been no consistent policy, and it has now been abolished altogether. The reasons for the abolition were based on the practical advantages for all concerned in being

[3] The matter is discussed in the introduction to a Government bill proposing a general statute on tort law (*Kungl. proposition* 1972 no. 5 med förslag till skadeståndslag), which was presented to the Riksdag in February 1972. See section 1.5.3 of the bill.

[4] See Lag om allmän försäkring (n. 2 *supra*) chap. 20, sec. 7, Lag om yrkesskadeförsäkring (n. 2 *supra*), sec. 51. The latter rule was amended in order to agree with the principle laid down for national insurance on Dec. 15, 1967, and the amendment entered into force on Jan. 1, 1969.

[5] See the report *Lag om allmän försäkring, m.m.* (*S.O.U.* 1961: 39), pp. 126 ff.

spared the trouble of handling subrogation claims and on the argument that reparation of basic losses due to torts is the concern of the state as much as is the repairing of losses due to pure accidents and illness. No closer examination of issues of policy was undertaken, with one exception. Deterrence is always very much in the Swedish eye when tort liability is discussed, and in this case the question was raised whether deterrence might be unduly impaired by the mitigation of tort liability. However, it was pointed out that tort liability would still exist for the part of the loss not covered by social insurance, and it was thought that this feature would sufficiently preserve the deterrent effect of tort liability.

But obviously a number of other questions must be considered, particularly if we contemplate going further in substituting social insurance for tort liability. These questions concern both basic issues of social policy and practical matters of organization. The two types of issues are largely independent of each other, and the technique of insurance enables us to separate or combine the various features in a way which was not possible at an earlier stage of evolution of tort law. We may therefore first examine the issues of social policy and then later turn to the matter of implementing the ensuing decisions.

When the functions of tort liability are discussed, one of two starting points is generally taken. Tort damages may be regarded as a kind of penalty imposed on a tortfeasor, and they are then compared with such penalties as fines, imprisonment, etc., particularly with regard to the deterrent effect. The fact that damages are computed on the loss of the person suffering damage and are paid out to him constitutes a distinctive feature in comparison with other penalties. Or else tort damages are considered to be a means of reparation and are compared with other forms of reparation. As reparation, damages are distinguished by the fact that they are financed by the tortfeasors or by insurers representing them. The former view corresponds largely to the historical development of tort liability and can perhaps be accepted for, e.g., liability for defamation, whereas the latter agrees more with present-day rules regarding liability for personal injuries, in particular those arising from automobile accidents.

For the present purpose, however, it will be better to distinguish, without restricting ourselves to any such view, between various functions of tort liability. We can then consider reparation of losses, allocation of the burden of losses, spreading of losses,

and deterrence as the four primary functions of tort liability.[6] Since social insurance is a system of reparation which largely fulfils similar purposes, it can be examined and compared with tort liability as regards these four functions.

REPARATION

As for reparation of losses, tort liability and social insurance differ substantially with regard to the circumstances in which a right to reparation arises. A right to tort damages presupposes in general that someone has acted negligently. On the other hand, a right to benefits from social insurance accrues chiefly because of circumstances—particularly old age, accidents and illness—that might cause wants if no insurance benefits were available.

Underlying this is a difference in the purposes of providing reparation. From a very general point of view, we can distinguish between three basic aims for giving reparation: meeting needs, restoration of *status quo ante,* and providing an equivalent for earlier (or possibly later) payments by the person entitled to reparation.[7] As just indicated, the aim of meeting needs, especially basic needs, is traditionally characteristic of social insurance and the aim of restoring *status quo* is equally characteristic of tort liability. It is perhaps questionable whether the condition of negligence on the part of a tortfeasor can be explained as depending on an aim to restore an earlier state of things,[8] but in other respects this aim appears clearly in tort rules. On the other hand, providing an equivalent for earlier payments appears to be typical neither of tort liability nor of social insurance but of private insurance, where the insurance proceeds are the equivalent of the premiums, having regard to the risk. In life insurance, e.g., the amount which the beneficiaries receive does not depend

[6] Cf. Hellner, "Skadeståndsrättens reformering", 1967 *Sv.J.T.* 673, 693–701, *Rättssociologisk undersökning av skadeståndsrätten, Förberedande utredning* (*S.O.U.* 1969: 58), pp. 27–30, and, e.g., A. F. Conard *et al., Automobile Accident Costs and Payments,* Ann Arbor, Mich., 1964, Chapter 2, R. E. Keeton & J. O'Connell, *Basic Protection for the Traffic Victim,* Boston 1965, Chapter 5.

[7] Cf. T. Eckhoff, *Rettferdighet ved utveksling og fordeling av verdier,* Oslo 1971, Chapter 5 and pp. 217–223.

[8] Cf., however, H. L. A. Hart, *The Concept of Law,* Oxford 1961, pp. 160–164.

either on their needs or on their economic position before and after the death of the insured, but on the contract with the insurer, who computes the premiums on the basis of the risk and the sum insured.

If we were to stick to the traditional aims of tort liability and of social insurance, we should have to draw the conclusion that social insurance cannot be a satisfactory substitute for a right to tort damages, since it does not provide for restoration in the sense just mentioned. However, a salient feature of the present evolution is the intermingling of aims that earlier were specific for each separate type of reparation. With the development of social insurance which has taken place in Sweden, its aim is now much higher than that of meeting basic needs.[9] Compensation for medical care from national health insurance is, if not complete, at least intended to cover all normal medical expenses. Compensation for loss of income during acute illness, emanating from the same insurance, is scaled to the income of the recipient and is intended to cover the main loss of all except those in very favoured economic circumstances. Although national basic pensions might be thought to provide the best example of social insurance purporting to cover basic needs, the situation is growing more complex. According to a general statement of principle advanced when the present principles were introduced, the purpose of disability annuities emanating from national pensions is to provide "compensation for the economic consequences, with regard to livelihood, of an illness or an injury"—surely an expression of an aim of restoration.[1] All people, including the richest, receive such pensions. In the national supplementary pensions, which are based on previous earnings and for which premiums are scaled to income (and paid either by employers or by the persons entitled to benefits themselves), the character of an equivalent of past payments emerges. Social insurance has in this case ventured far into the field which was earlier the preserve of private insurance. The reason for choosing social insurance rather than private insurance for the purpose involved in supplementary pensions is to be found partly in the greater possibilities for financing the insurance that are open to social insurance which is entirely compulsory, and partly in administrative con-

[9] See Hellner, "Analysis of the Swedish Auto Compensation System", *loc. cit.* n. 2 *supra.*

[1] See the report *Förtidspensionering och sjukpenningförsäkring m. m.* (*S.O.U.* 1961: 29), p. 63.

venience.[2] Accordingly, the role of social insurance is no longer to meet basic needs. We must at least allow for the modification that needs other than the basic ones are to be met. In fact, the benefits often come close to the level of full restoration.

At the same time, there is a new tendency to regard the covering of needs as a main purpose also of tort liability. This tendency is not restricted to countries like Sweden; in the United States it appears most clearly in automobile compensation plans such as the one that recently entered into force in Massachusetts.[3] The sums provided under this plan have some affinities with social insurance benefits in Sweden, although the conditions for acquiring them and the principles for assessing losses belong to tort law.[4] In Sweden the tendency to transfer social insurance aims and arguments to tort liability is not confined to special fields, such as automobile accidents, but appears quite generally. Present tort rules are criticized because they take too little account of the need for reparation as a basic policy.[5]

The choice between restoration and covering of needs is therefore no longer identical with the choice between tort liability and social insurance. We can perceive it in the discussion of the "bathtub argument". As may be recalled, the argument goes as follows. If the victims of automobile accidents are to receive special advantages consisting in rights of compensation even if there is no negligence on the part of a tortfeasor, it is asked why the same advantages should not be given to those who suffer injuries in other circumstances, e.g. the man who slips in his bathtub and is injured.[6] Both are in need of compensation. In the United States, this argument seems to be commonly rejected, but in Sweden it has sometimes been accepted in principle, although it is not expressed in quite the same way. It is argued that the need for compensation when an accident has occurred depends not on the kind of event that caused it but only on the

[2] Cf. Hellner, "Damages for Personal Injury and the Victim's Private Insurance", 18 *American Journal of Comparative Law* 126, 141 (1970), with regard to the problem of collateral benefits.

[3] Cf. R. E. Keeton & J. O'Connell, "Alternative Paths Toward Nonfault Automobile Insurance", 71 *Columbia Law Review* 241 (1971).

[4] Cf., regarding Norwegian law, Selmer, "Interactions between Insurance and Tort Theories in the Norwegian Law of Personal Injuries", 18 *American Journal of Comparative Law* 145 (1970).

[5] Cf. the Government bill 1972 no. 5, pp. 100 ff.

[6] See R. Marx, "The Case for Compulsory Automobile Compensation Insurance" cited by C. Gregory & H. Kalven, *Cases and Materials on Torts*, Boston 1959, at p. 750. Cf. Keeton & O'Connell, *Basic Protection*, at pp. 3 ff.

economic situation of the victim after the accident. Thus it has been maintained that the widow of a fireman has the same need of compensation whether her husband was killed by falling down the stairs of his dwelling because the landlord had failed to keep them in proper repair or whether he was killed while fighting a fire in the course of his duty. The conclusion is that she should have the same right of compensation in both cases.[7] A possible third case, that the fireman died from illness, is not mentioned.

If the need for compensation after the occurrence of a death or an accident is taken as the ultimate criterion for granting a right to compensation, the foundations of tort liability in the traditional sense are shaken. The fact that an accident was caused by negligence then constitutes no reason why the victim should have a greater right to compensation than he would under other circumstances, only possibly a reason why the tortfeasor should be made to pay for it. The arguments for imposing strict liability on automobile traffic or on any kind of ultrahazardous activity cannot justify a better right of compensation than would exist under ordinary circumstances. In short, we must accept the bathtub argument, at least in principle.

But we should not dispose in so simple a fashion of the aim of restoring *status quo ante* with regard to tort liability, not even if we take into account the possibilities of providing reparation by social insurance in its present, more developed form. Security in society would be deficient if anyone suffering an injury were only to be entitled to reparation on the scale of social insurance, regardless of the circumstances in which the injury occurred. The person injured will not compare his situation after the injury with that of people in general but with his own situation before the accident. It is bad enough for him that it is often literally impossible to restore the non-economic conditions. To have the initial economic conditions restored as far as possible appears to be necessary for decent security. The demand for better reparation than that provided by social insurance in general appears most clearly when injuries are suffered during work. Why should a person consent to undertake work which brings a risk that is much higher than normal, unless he either receives higher pay, which he can then use for acquiring a right to compensation in case of accident, or has the certainty of receiving compensation

[7] See the Government bill 1972 no. 5, pp. 100 ff.

from the employer or some other person?[8] The risk of suffering an economic loss by undertaking dangerous work is an economic drawback whose reality is not diminished by the uncertainty of the risk being realized. When there is a bargain situation, this risk can be taken into account, and often it is. It is possible that a person seeking an employment does not realize the importance of the risk, but society should then protect him against his own imprudence.[9] If he is forced, because of scarcity of employment, to accept work which is dangerous but is paid without regard to the risk, then society should likewise bring him protection. Similar arguments could be brought forward for the situation where a person has the choice between going by car—which is supposed to be risky—and going by train—which is supposed to be safe—but they need not be examined here. There is accordingly a reason for providing better reparation for injuries suffered during dangerous work than for injuries associated with safe work, and also better reparation for injuries suffered through automobile accidents than for injuries sustained in a bathtub. The reason lies in the difference in the risk.

This argument can be applied not only to tort liability but also to social insurance. There are practical instances of such reasoning in recent events in Sweden. Not long ago a proposal was presented for integrating industrial injuries insurance more closely with the general system of national insurance.[1] In view of the high level of national insurance benefits in general, it was proposed to restrict the benefits payable to people injured during work to the same level as those payable to persons disabled in other circumstances (although a number of exceptions were foreseen where industrial accidents would qualify for additional benefits). This proposal caused a sharp reaction from the Confederation of Swedish Trade Unions, which argued that the better compensation traditionally obtainable from the industrial injuries insurance was a necessary counterweight to the higher level of risk prevailing in industrial work in comparison with

[8] Cf., e.g., J. F. Burton & M. Berkowitz, "Objectives Other than Income Maintenance for Workmen's Compensation", 38 *Journal of Risk and Insurance* 343, 349 (1971).

[9] Cf., e.g. W. J. Blum & H. Kalven, "The Empty Cabinet of Dr Calabresi, Auto Accidents and General Deterrence", 34 *University of Chicago Law Review* 239, 248 (1967).

[1] *Yrkesskadeförsäkring, Betänkande med förslag till yrkesskadelag m.m.* (*S.O.U.* 1966: 54).

everyday life.[2] As a result of this reaction, the industrial injuries insurance was retained substantially in its old form.[3] There are also examples in Sweden of longshoremen and other categories of employees whose work carries a high risk of accidents acquiring by collective agreements a right to compensation according to tort law standards, irrespective of any negligence by an employer.[4]

As long as social insurance, together with the cheap collective private insurance which was referred to earlier in this article,[5] does not provide full restoration for all kinds of economic loss due to personal injuries, it is likely that there will exist a demand for fuller protection, with restoration as the target, for special cases. There is also a demand for compensation for pain and suffering which at present can be met only by tort liability. The practical problem for a country like Sweden seems to be whether it is necessary, as at present, to maintain three different levels of reparation: that of national insurance, which operates regardless of the circumstances under which the loss arose; that of industrial injuries insurance, which provides further benefits for accidents suffered in employment; and that of tort liability, which aims at complete restoration, including compensation for pain and suffering, for injuries caused by the negligence of a tortfeasor or by hazardous activity or some such circumstance. To these three levels must be joined the modifications derived from private insurance procured by the recipient himself, or possibly by his employer or a trade union. Against this three-level system may be set up as an alternative a system with two levels of reparation.[6] The modifications caused by the victim's private insurance might also be simplified. The important feature to be retained is that there is one higher level of reparation which aims at restoration, although perhaps not full restoration of the very highest losses. Tort liability or social insurance, whichever means is chosen, should provide additional benefits in cases where special circumstances—including perhaps but not necessarily the negligence of a tortfeasor—justify reparation on this higher level.

[2] Statement of Feb. 6, 1967 (mimeographed) by Landsorganisationen i Sverige.
[3] See the Government bill (*Kungl. proposition* 1967 no. 147) at pp. 74 f.
[4] Agreement of Dec. 14, 1971, which entered into force on Jan. 1, 1972.
[5] *Supra*, p. 190 at footnote 3.
[6] Cf. the writer's report *Rättssociologisk undersökning av skadeståndsrätten* (*S.O.U.* 1965: 58), p. 44.

ALLOCATION OF LOSSES

In the normal case, tort damages for personal injuries are paid by an insurer, acting on behalf of a person responsible in tort. Reparation is thus financed not by the tortfeasor himself, nor by tortfeasors in general, but collectively by those who may become responsible in tort and therefore choose to take out insurance or are compelled to do so. For damage caused by motor traffic, the group may roughly be described as that of automobile owners. For damage arising out of industrial activity, the financing group comprises those enterprises (in practice the great majority) that consider it worthwhile to carry liability insurance. These groups differ considerably, as regards both their composition and the principles for deciding contributions, from the groups that finance the various branches of social insurance. In Sweden, social insurance is paid for—according to complicated rules peculiar to each branch—by taxpayers, employers and beneficiaries. Since, as already mentioned, insurance benefits are deducted from tort damages and there is no subrogation, the burden remains with those who pay for social insurance and is not shifted over to those who cause the damage or can otherwise influence its occurrence.

A common feature of tort and social insurance financing in Sweden (and in many other countries) is that it does not reflect any conscious aim to allocate rationally losses due to accidents. Tort liability is largely imposed on those who are negligent or their employers, or on owners of cars driven by negligent drivers. The fact that through the device of insurance the burden of this liability is spread among a much larger group which includes a great number of people who are not negligent, or whose negligence does not cause any damage, does not guarantee that the final result corresponds to any aim which can be sustained on rational grounds. But yet it is perfectly possible that, in spite of this lack of conscious aims, the present system of tort liability can be justified on rational grounds. This is a different question. Social insurance, on the other hand, is financed according to somewhat vague, often pragmatic, considerations of justice in the placing of the general burden of social costs. The fact that some cases where a right to benefits arises are caused by accidents or even torts is not taken into account. With the exception of industrial injuries insurance, where the employers pay the premi-

ums of the insurance, the system has little to do with the ways in which injuries are caused.

The suitability of financing reparation according to the principles resulting from tort law in combination with liability insurance has recently been criticized on three widely diverging grounds.

One argument is that the principle of restoring *status quo* makes the poor contribute to the reparation of losses suffered by the rich and incurred as a result of their high incomes. "Why should the peasant be required to pay for the comfort of the king?" is a way of expressing this argument.[7] In addition to what else can be held against the argument, its force can be mitigated by adjusting the premium system in such a way that those who are to receive higher compensation also pay higher premiums which correspond to the level of the compensation.

Another argument is concerned with the fact that whenever tort liability is not covered by insurance, there is a risk that it will hit the person liable too hard. In Sweden it is sometimes maintained that in such a case the duty to pay damages may ruin the person on whom it falls.[8] The argument mentioned before presupposes that insurance exists but requires a premium sufficient to let even high losses be covered, whereas with the present argument the presupposition is that there is no insurance. The two arguments lead to the same conclusion, i.e. that the traditional principles of tort insurance place too heavy a burden on tortfeasors, especially those that are poor or improvident. Social insurance is therefore thought to correspond better to the requirements of social justice.

However, the two arguments will hardly sustain such a far-reaching conclusion. The fact that some hardship may ensue from letting tort liability principles decide the allocation of the burden cannot justify the total abandonment of these principles. The easiest way out of the problem of financing the reparation—placing the burden where it falls when general principles of financing social insurance are applied—is taken, and taken on insufficient grounds without considering further consequences.

Against the arguments now discussed we must contrast criticism of the third type. Its chief proponent is Professor Calabresi

[7] A. F. Lowenfeld & A. I. Mendelsohn, "The United States and the Warsaw Convention", 80 *Harvard Law Review* 497, 565 (1967).

[8] See the Government bill 1972 no. 5, pp. 100 ff.

of Yale University.[9] His main criticism of traditional tort liability, combined with liability insurance, is based on the view that such liability does not place the burden of costs rationally. Instead of trying to place it on those who are negligent, one should place the liability on those persons who are in the best position to act in such a way that damage is decreased, and these persons are often not those to whom fault can be ascribed. The system of financing reparation should serve as a means for "general deterrence", i.e. by providing those who by their actions can influence the occurrence of accidents with economic motives for acting in such a way that injuries are minimized.

The general idea that tort liability should be imposed with regard to the economic consequences of the liability was first advanced long ago.[1] But it then took the more primitive form that all activity should bear the losses that it causes as costs of the activity. Professor Calabresi, on the other hand, would allocate losses in such a way that shouldering the burden of the losses can act as an incentive towards diminishing the losses.

It is clear that this argument is very different from the two just referred to. Moreover, it runs strongly counter to the resort to social insurance which is the outcome of these objections to tort liability. In fact, Professor Calabresi admits that social insurance may from many points of view be the simplest way of covering losses; his chief objection to it is that social insurance does not provide general deterrence, since it implies that no one who can diminish the risk of accidents is made to feel the burden of the cost of the losses.[2] By social insurance the cost of accidents are "externalized" in relation to all activities that can influence their occurrence.

An important issue must always be to what degree the fact that costs are externalized influences various kinds of activity which may cause losses. Although one cannot generalize, a certain scepticism seems called for. We know very little about the impact of economic factors, especially those relating to costs of accidents. There is constant discussion on the subject whether

[9] See in particular *The Costs of Accidents, A Legal and Economic Analysis*, New Haven, Conn., 1970.

[1] See V. Mataja, *Das Recht des Schadenersatzes von Standpunkt der Nationalökonomie*, 1888.

[2] G. Calabresi, "The Decision for Accidents: An Approach to Nonfault Allocation of Costs", 78 *Harvard Law Review* 713, 715 (1965); *id.*, "Fault, Accidents and the Wonderful World of Blum and Kalven", 75 *Yale Law Journal* 216 (1965); *id.*, *The Costs of Accidents*, pp. 6, 46. Cf. Blum & Kalven, "The Empty Cabinet of Dr Calabresi", *loc. cit.* n. 9, p. 196 *supra*, at p. 244.

private motoring—which among other things carries higher risks than public transport in proportion to each person transported —is made to bear its costs to a sufficient degree, or whether present society does not in fact twist the choice between driving one's own car and using public transport by making the taxpayers pay part of the cost of private motoring. But what is then considered are the costs of maintaining streets and highways, providing parking facilities, suffering the evils of air pollution from exhaust fumes, etc. The losses covered by social insurance—which constitute only part of the total losses due to automobile accidents—are rarely mentioned in this discussion, probably because they are much smaller than the other costs involved. This situation may reflect conditions peculiar to Sweden. The situation may also be different with risks other than those of automobile accidents. But altogether it seems doubtful whether in a society where strong efforts are directed towards preventing industrial injuries, automobile accidents and other kinds of injuries and illness by all kinds of compulsory safety measures, administrative control, penalties, etc., the placing of the burden of reparation can produce any decisive effect on actions influencing damage.

Such scepticism does not imply that the burden of injury reparation can without hesitation be placed entirely on social insurance, to be carried in the same way as other costs of such insurance. In the first place there is always the possibility that in special cases tort liability may exercise "general deterrence", even if this is not universally so. Placing all the costs of losses due to personal injuries on social insurance means that we renounce altogether the opportunity of deterring against damage by the means of creating economic motives, unless we make a number of exceptions. Making exceptions, on the other hand, does not agree well with the aim of maintaining simple and consistent principles which is characteristic of social insurance. In the second place, there may be other reasons why we should allocate the burden of injuries caused by a certain activity on this very activity. In particular we can consider it just and equitable to allocate the burden in this way, even if no beneficent effects on deterrence can be perceived.[3] Such arguments must be weighed against the views mentioned earlier, according to which the burden placed on the persons responsible by tort liability may be too heavy to accord with social justice.

[3] See, e.g., Blum & Kalven, "The Empty Cabinet of Dr Calabresi", at p. 264; Calabresi, *The Costs of Accidents*, at p. 24.

Leaving considerations of general deterrence aside, there is much to be said in favour of the view that, in a country where social insurance is highly developed, reparation for basic losses due to automobile accidents or any other kind of accidents caused by torts should be financed in the same way as other basic losses arising from illness and injury. But if we assume—as was done earlier—that there should be a higher level of reparation for certain losses, it seems reasonable to finance the additional benefits by laying the burden on an activity which causes them (or can influence their occurrence). This position agrees with present practice, in so far as industrial injuries insurance is entirely financed by employers, and tort liability, including tort reparation for automobile accidents, by the mechanism of liability insurance. Accordingly, higher-level reparation should not be financed by the ordinary sources of social insurance. A possible development of social insurance by which it is made to cover the higher-level reparation should then presuppose that the additional benefits are financed in another way than the lower-level benefits are.

In a country where social insurance is not highly developed, the general policy might be the same even though the outcome will be different. If basic losses are in general not borne by taxpayers and others who contribute to the costs of social insurance, there seems to be little justification for letting these losses be borne by the taxpayers when the special circumstances characteristic of automobile accidents call for exceptional compensation for such losses. This would explain and justify why, according to automobile accident plans, benefits which correspond to those of social insurance in countries like Sweden are integrated into a scheme of tort compensation and thus paid for by motorists.[4]

SPREADING OF LOSSES

The loss-spreading effect of tort liability depends largely on the extent to which tortfeasors carry liability insurance. For certain types of activity and certain countries, such insurance is very common. But even where this is true, there are important gaps in the coverage. When insurance is compulsory—as in Europe

[4] Cf. Keeton & O'Connell, 71 *Columbia Law Review* 241, 246 (1971).

is generally the case for automobile accident liability—the loss-spreading effect is increased, especially if the system provides damages even where insurance has been omitted in spite of the compulsion, or the person responsible cannot be identified. However, principles of contributory or comparative negligence weaken the distribution of losses, even where liability insurance exists, since to the extent that these principles make the loss remain on a person suffering injury, it is mostly not spread out by any kind of insurance but left to be borne by him alone. Only where the gap left by the reduction of tort liability is filled by the victim's personal accident insurance or by some similar measure can the corresponding loss be spread.

Social insurance is in general completely compulsory, and the beneficiaries can generally draw benefits even if, e.g., an employer who is under a duty to provide insurance for his employees omits to do so. So far it is satisfactory as a means for spreading losses. But there are also circumstances which operate in the other direction. The limits on the amounts of the benefits available from social insurance diminish its loss-spreading effect, in the same way as contributory or comparative negligence decreases the loss-spreading effect of tort liability. Subrogation may also diminish the spreading of losses through social insurance. But, as mentioned, this effect will not appear under present Swedish law, since subrogation has been abolished altogether.

We can ask whether the loss-spreading effect achieved through tort liability is sufficient, in view of the limitations just referred to. The same question can be put with regard to social insurance. In other words, can the limitations in loss-spreading be justified by themselves, not only accepted as unfortunate drawbacks of the principles governing tort liability or social insurance? With regard to tort liability, the answer is in the negative, since the arguments supporting reduction of damages because of contributory or comparative negligence do not support any conclusion that the portion of the loss not covered by damages should be left undistributed. On the other hand, it is easier to justify the limitations of the benefits provided by social insurance from this point of view, since these limitations are based on the idea that the part of a loss which is not covered by social insurance need not necessarily be spread but can be borne by the injured person himself without undue hardship.

Altogether, social insurance seems to fare better than tort liability in a comparison referring to the loss-spreading function.

But it is probably possible to improve tort liability in this respect by minor changes in the rules relating to contributory or comparative negligence.

Loss-spreading is a prerequisite for general deterrence, since this effect presupposes that the cost of possible accidents is felt even before any accident has taken place, in the form of the cost of the premium for liability insurance.[5]

DETERRENCE

Tort liability can act as a deterrent against conduct leading to damage in two ways. One way has already been mentioned: that of creating economic motives for acting in a way which diminishes the risk of damage (general deterrence). The other type of deterrence, which is the one principally considered in Scandinavian discussion and the one with which we shall now be concerned, implies that the individual who is threatened by tort liability avoids actions which may lead to damage, either because he fears the economic consequences of a damage when it occurs, or because responsibility attached to actions which are disapproved enforces the general attitude that such actions are undesirable or immoral and should be avoided.[6]

Developing the deterrent effect of tort liability leads to conflicts with other aims which we may want to pursue by such liability. This is true particularly of allocation of the burden of reparation and spreading of losses. It does not accord with the purpose of a deterrent to have its burden shifted over from the person on whom it is imposed, i.e. the tortfeasor, to a large group of other people, many of whom are entirely innocent of any fault but who may, by the fact that they are being made to shoulder part of the burden, receive a motive for choosing actions which indirectly diminish the number of accidents. Those who adhere to the view that tort liability should, among other things, act as a deterrent against negligent actions therefore often propose various limitations in the loss spreading, such as permitting or

[5] See Calabresi, *The Costs of Accidents*, pp. 55–64.

[6] The latter form of deterrence is often referred to in Swedish writings; see, e.g., P. O. Ekelöf, *Straffet, skadeståndet och vitet (Uppsala Universitets Årsskrift* 1942: 5), Uppsala 1942, pp. 92 ff.

even encouraging subrogation claims, preventing the tortfeasor from insuring the whole of his liability, etc.[7]

But even if the objections based on such conflicts between aims are considered irrelevant, the general suitability of tort liability for deterrence may be doubted. Since damages are computed with regard not to the conduct of the tortfeasor but to the loss of the person suffering damage, their amounts will have no bearing on the need for deterrence. High damages, such as may be necessary for preserving the reparative function, may place too heavy a burden on the person liable unless there is liability insurance. On the other hand, in some cases serious negligence may occur without causing any economic loss, or causing only a very slight loss, and then the duty of paying damages can be considered insufficient as a reaction. There are some situations where damages may be appropriate for punitive purposes, for instance where the tort consists in defamation or in some other personal wrong of the same type, but in these cases social insurance is no alternative.[8]

The same conflict between different aims as was mentioned with regard to tort liability can be found if social insurance is judged from the point of view of deterrence. The loss spreading achieved through the system of financing such insurance will not permit any deterrence against undesired conduct. If we consider deterrence an important object of a reparation system, social insurance must therefore be considered unsatisfactory and tort liability should be preferred to it. Such a view seems in fact to occur.[9] On the other hand, it is possible to introduce a certain amount of deterrence into social insurance by permitting the social insurer to recover part or all of what he has paid to the injured person from a tortfeasor. The efficacy of this method is, however, belied by earlier Swedish experience. At the time when subrogation was permitted from social insurance towards a tortfeasor, it was extremely rare that it could be enforced against any one but liability insurers and the state.[1]

[7] Cf. Hellner, *Försäkringsgivarens regressrätt* (The Insurer's Right of Subrogation) (*Uppsala Universitets Årsskrift* 1953: 3), Uppsala 1953, pp. 237–41, with references to the Scandinavian discussion.

[8] See, e.g., H. Stoll, "Penal Purposes in the Law of Tort", 18 *American Journal of Comparative Law* 3 (1970).

[9] See, in the Swedish discussion, e.g., G. Walin, "Några punkter i en allmän skadeståndslag", *Förhandlingarna vid det 22 Nordiska Juristmötet 1960*, Copenhagen 1961, at p. 11.

[1] Cf. the report "Lag om allmän försäkring, m.m." (*S.O.U.* 1961: 39), at p. 127.

Since even tort liability is not satisfactory as a means of deterrence, its possible advantage over social insurance must be admitted to be illusory. Neither the one nor the other can be regarded as a suitable means for deterrence of the kind now contemplated. However, a certain reservation should be made. If tort liability for damage other than injury to persons, for instance damage to property, is supposed to be valuable as a deterrent, perhaps liability should be preserved also for personal injuries, since it might be impractical to make a distinction between different types of damage with regard to tort liability. Here we encounter the necessity of seeing both social insurance and tort liability in their connection with reparation of other losses than those primarily contemplated, and with questions of administration of reparation. There may, of course, also be other secondary reasons for imposing tort liability for personal injuries, because such liability reinforces other more efficient means of deterrence.

IMPLEMENTING DECISIONS OF SOCIAL POLICY

The foregoing survey has given the general result that neither tort liability nor social insurance is satisfactory as a means of deterrence, although perhaps tort liability is marginally the less unsuitable. Moreover, the deterrent effect can hardly be improved without impairing other important functions. It seems natural to conclude that we should give up the idea that tort reparation —or any other system of reparation—should be used for the purpose of deterring against undesirable conduct. This conclusion is not new. But it gains new support when we ask whether tort liability carries any important advantages over social insurance.

If we disregard the possible function of deterrence, tort liability and social insurance do not seem to differ fundamentally with regard to the other functions discussed here. Reparation at a higher level than that of ordinary social insurance can be administered by the same institutions as handle reparation at the lower level. On the other hand, insurers handling tort claim can surely also administer the lower-level reparation which in Sweden is provided by national insurance, if the need should arise. Financing higher-level reparation through sources other

than those used for social insurance in general should not be impossible, as is indicated by the fact that in Sweden employers finance industrial injuries insurance which is administered together with national insurance. Premiums for industrial liability insurance are generally computed on the payrolls of the enterprises, which are also the basis for the contributions to industrial injuries insurance. It should not be impossible to allocate losses due to automobile traffic, defective products, etc., through social insurance rather than through tort liability. The loss-spreading function of tort liability can, if necessary, be improved by the use of compulsory insurance, but the question is whether the costs of compulsion are worth the advantages.

Taken one by one, the differences do not seem to be fundamental, and by adjusting the system as it now stands on minor points deficiencies could without doubt be corrected. Major changes will require a careful investigation of the advantages and disadvantages of the two systems, but in principle it seems possible to reach whatever results we consider desirable within either of the two systems.

This leads us to the conclusion that the general question of administering reparation must necessarily be drawn into the foreground, and that this question is largely independent of whether we prefer aims now primarily associated with tort liability or aims at present characteristic of social insurance. It is impossible to examine in detail the various features which must be considered, but some of them may be briefly surveyed.

Tort liability is often supposed to be administered on the basis that an injured person in a rather hostile manner raises a claim against an insurer who controls the claim with all available means. Swedish insurers emphasize that this is not the way they handle claims.[2] A person who has been injured by an automobile accident is treated as one who *prima facie* has a right to compensation, and the adjustment is carried through on this basis. In fact, the insurers contrast the personal interest which they take in adjusting claims with the impersonal formalism supposed to characterize social insurance, which is subject to more bureaucratic rules of procedure.

Be this at it may. On a number of points we might profitably compare the administration of tort claims with that of social insurance, on the assumption that there is no fundamental differ-

[2] Cf. Hellner, "Analysis of the Swedish Auto Accident Compensation System", at pp. 144 ff.

ence between them as to aims, but that both should provide compensation to injured persons according to rules entitling them to such indemnities. It is a requirement as much of the one institution as of the other that a person who has suffered an injury should know where to turn with a claim for compensation, that such a claim should be handled swiftly and competently, and that there should be an efficient system of control over the handling. Taking a tort claim to court is a way of bringing this system of control into operation, just as bringing an appeal against a decision of social insurance authorities to higher authorities or an administrative court is a way of controlling social insurance.

Tort liability is sometimes compared with social insurance with respect to costs of administration, and the comparison shows an inferiority of tort liability.[3] But it is easy to overlook that the costs of social insurance may be low because this type of insurance comprises a great number of exceedingly simple claims which can be handled at low cost. With tort liability it is uncertain whether the comparatively high level of costs reflects—as is popularly held—a practice of contesting claims whenever possible or—as the insurers themselves often maintain—the habit of adjusting claims to the advantage of the plaintiff in so far as possible.

The final judgment as to the best method of administration must take account of the combined effects. Maintaining both an extensive system of social insurance, by which some or all losses from personal injuries are covered, and a system of tort liability, which provides compensation for higher losses in some cases, may be costly, even if separately each system operates at low cost. On the other hand, since most automobile accidents do not give rise to personal injuries, only to damage to property, the costs of covering personal injuries cannot be estimated alone. It is impossible to say without closer investigation which combination operates at the lowest cost, in view of the advantages which it provides. We are entering here a field of familiar problems of economic efficiency, although the fact that we are concerned with basic issues of legal policy implies that there are further considerations, relating to non-economic issues, in addition to those ordinarily contemplated in such an examination of efficiency.

[3] See, e.g., A. F. Conard *et al.*, *Automobile Accident Costs and Payments*, at pp. 52–66.

The difference in aims and principles between tort liability and social insurance should not make us overlook the very real problem of finding the best suitable system for administering reparation. Perhaps the next stage in the discussion should be to consider carefully matters of organization and administration, while leaving principles for computing compensation and allocation of losses temporarily aside.