TORT LAW AND DEVELOPMENT

BY

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When getting on in years, one has the future behind one. One does not look ahead so much as back, and one needs to take stock of one's life in order to explain or justify the way in which it has been spent. One is interested in history, in one's own history.[1]

Usually I say that the things I have devoted my time to are all those I did not understand when I was studying. And that was quite a lot. Even then I needed to understand, as I found it very difficult to learn something without knowing what it meant. I remember that during my first year of study I took the liberty of writing to the professor of philosophy, who had published a social science methodology for use in the then obligatory philosophy exam taken at the end of the first university year. I criticized his attempt to reformulate philosophy in terms of functional problems. Asking "how" was not enough: I wanted to ask "why" as well. I no longer remember what the friendly professor replied, but I presume the answer was that this kind of question concerned metaphysical problems with which science is not supposed to deal. We were then living in the golden age of logical positivism, immediately after World War II.

Having graduated in the summer of 1949 I was sent to Stockholm by Professor Illum to find out how to handle the difficult question of assessing damages for personal injury. Somewhere, Professor Illum had read about the Swedish Traffic Insurance Companies' Tribunal (*Trafikförsäkringsanstalternas Nämnd*), which made administrative decisions on cases concerning damages for personal injury. He had also seen a couple of articles by the then Magistrate (*häradshövding*) Erik Hörstadius in *Svensk Juristtidning* on the same subject. I received a hearty welcome from the Tribunal, but what I remember most distinctly from that summer was the incredible luxury in which the Swedes were living.

I remember too that I read Johs. Andenaes' paper on the past and future of the law of torts (1943)[2] and Per Olof Ekelöf's little book *Straffet, skadeståndet och vitet* (Penalty, Compensation and Fine), 1942. However, what came to deter-

[1] In my paper "Towards Strict Liability" in 7 *Scandinavian Studies in Law*, 1963, I presented my views on the development and function of tort law. Later presentations were: "Ersatz und Versicherung", *Versicherungsrecht* 1970, pp. 193–207, "The Decline and Fall of the Law of Torts", *American Journal of Comparative Law*, vol. 18, 1970, pp. 39–53, "Liability and Fault", *Tulane Law Review* 1975, pp. 329–45. The philosophical and history-of-ideas point of view has been dealt with in: *Ethik und Gerechtigkeit, Veröffentlichungen der Joachim Jungius-Gesellschaft der Wissenschaften in Hamburg*, no. 41, Göttingen 1980, *Values in Law*, Copenhagen 1978, pp. 50 ff., *Vertrag und Recht*, Copenhagen 1968, pp. 111–38, *Law and Society*, Copenhagen 1970, pp. 65–75.

[2] *Fortid og framtid i erstatningsretten*, *Norsk Forsikringsjuridisk Forenings Publikasjon*, no. 15.

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because calculation of loss of income brought into relief the assessment of damages for loss of both income and maintenance. However, I have also found the social aspect interesting, as it was quite obvious that compensations fixed by the Danish courts for disablement and loss of maintenance were far below those of other countries. To me it accentuated the problem of whether the damages for personal injury in Danish tort law were full compensations or not. This further raised two problems which were then the subject of much debate. In his *Obligationsrätt* (Law of Obligation) of 1956, Knut Rodhe had advocated the view that the general structure of the concept of damage involved a comparison between an actual and a hypothetical event, a view which had been maintained by Ulf Persson some years before.[6] This general concept of damage had been strongly criticized by others, who in support of the contemporary realistic and analytical legal philosophy claimed that it was meaningless to employ a general concept of damage: there were only different methods of computing loss, depending on the different types of tort. This conception was connected with the claim that existing law is identical with what the courts actually do, and that consequently it was without meaning to say that Danish courts did not give full compensation for personal injury. The amounts actually fixed by the courts for personal injury were necessarily a manifestation of full compensation. Likewise the concept of "general average" was criticized, which—referring to the Danish Supreme Court barrister Ahnfeldt Rønne—I had applied as a designation of limitation of damages for personal injury according to certain normal incomes and normal losses and the tendency when assessing loss of maintenance to take into consideration private insurance and various other payments. It will be remembered that Swedish legislation here spoke of dependants who would be without necessary support (*erforderligt underhåll*). While the critics thus failed to recognize the concept of "general average" they could fully accept the consideration of practicability, which led insurance companies and courts to apply standardized methods for damage assessment and the principle of habituation which inevitably resulted in a restriction of the gauging of damages, especially when—as is the case in Denmark—the principle of summation was applied.

Legal economic or operating economic considerations had long been included in the debate concerning the elaboration of the tort rules. In defence of an extension of liability in excess of the rule of negligence, Ussing had stated at the beginning of the century that enterprises which despite their potentially dangerous nature were considered to be lawful ought to bear their own damages as operating costs, if *first* the activity was an extraordinary one which *secondly* implied a specific danger that *thirdly* was perceptible during the action. However, Danish court practice did not follow Ussing's recommendation, and

[6] *Skada och värde*, Lund 1953.

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as a rule it did not impose liability for damages without negligence, unless such a liability was specifically authorized by statute, which it actually was in a number of cases within the new technology of communications, e.g. railways and air traffic but not shipping. For motoring and for electric plants, a presumptive (*res ipsa*) liability was adopted, which in practice, however, came to function as a strict liability.[7] As early as the 1890s, court practice had interpreted vicarious liability in a provision in III-19-2 of the Danish (and Norwegian) Code of King Christian V (1683), which in its historic context meant rather the opposite. In Sweden and Finland there was no corresponding provision which could be used as as formal authority for vicarious liability, and neither did court practice go further than to adopt strict liability for managers. In the larger European countries, too, there was a tendency to extend the liability for employees, but while German law rather stopped at presumptive liability for employees, vicarious liability was adopted at an early stage in British law. The history of industrial insurance legislation in Denmark in the 1890s shows a corresponding discussion of whether enterprises ought to bear the risk of injury to their own employees according to a strict rule. However, the solution was the introduction of a compulsory employers' social insurance for employees, who in return for the guarantee of damages would have to be satisfied (according to the regulation) with reduced payments.

Norwegian court practice on the other hand had gone further in imposing industrial liability according to prevailing economic criteria. Industrial liability was imposed on enterprises which empirically, and consequently calculably, caused damage of a certain extent to their surroundings. Likewise Sweden imposed strict liability for explosions and certain adverse consequences of military training.

This was the situation in 1960 when Danish Supreme Court Justice Jørgen Trolle published his *Risiko eller skyld* (Risk or Negligence), in which, supported by a great number of Danish court decisions, he claimed that Danish courts actually exceeded the general rule of negligence considerably and imposed strict liability. In my review of Trolle's book I rejected his interpretation of court practice, which in my opinion was based on insufficient analysis of the concepts of negligence and risk.[8] As Trolle had started from a traditional, individualistic and subjective view of the concept of negligence as requiring the presence of concrete calculable and preventible risks, it necessarily appeared that the courts to a large extent imposed strict liability. Secondly I claimed that it was a false way of presenting the problems, since the rule of negligence also indicates a distribution of the risk of damage among different groups in society. In my opinion the subjective concept of negligence had to be the

[7] See, however, below, the new Act of 22nd November 1985 concerning strict motor liability.
[8] See "Towards Strict Liability" (*loc.cit.* footnote 1).

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natural basis of the rather uncomplicated society of the 19th century, which was still based on a form of social balance with a rather limited occurrence of injury. However, concurrently with the strongly increasing accumulation of capital and large-scale operations in the second half of the 19th century, a fundamental change in underlying conditions took place, and was reflected in the development of the liability rules. The rule of negligence was based on the idea that individuals were not allowed to cause a foreseeable risk of damage to their surroundings, since violation of this basic rule had to be conceived as morally unjustifiable and consequently involving liability for damages. However, technological progress meant society's accepting a considerable rise in the level of danger and consequent injury and inconvenience, in virtue of the general advantages accruing from such progress. As we also see today, "progress" results in considerable anxiety and aversion among the population. People react negatively, insisting on prohibitions or stringent liability rules; but they gradually become accustomed to the new conditions created by the latest regulations for controlling and reducing the consequences of damage.

In this connection it is interesting that in Prussia strict liability was introduced for damages arising from railway operations at the same time as the German jurist Rudolph von Ihering formulated his famous principle of negligence: no evil without guilt (*Schuld*). As mentioned, however, it is peculiar that legislation and court practice only within certain limits introduced strict liability rules, but naturally reinterpreted the rule of negligence in conformity with the new situation arising from a network of formal and informal rules for the management of modern technology. The concept of culpa naturally had to assume another content in a modern, complicated and thoroughly regulated world. However, my analysis of court practice also showed that, in their concrete decisions, the courts were more interested in establishing whether there was violation of such general rules and rules of conduct than they were in finding out whether the actual damage might have been expected and prevented. The extension of liability was a tightening-up of the rules of conduct rather than an extension of liability beyond the rule of negligence.

Yet it turned out that court practice had at certain points exceeded the formal rule of negligence by imposing increased liability for damage. As for damage to adjoining houses in connection with excavation, damage as a result of traffic obstacles on public roads and damage due to defective materials, it was here that the courts had gone furthest as regards imposing strict liability. But even in cases of damage to adjoining property, the courts imposed liability only where the construction methods used had been cheaper and less adequate than other technically possible solutions. And more recent Danish court practice tends on the whole to impose liability only where such economic considerations can be demonstrated.

Court practice also emphasized that in the performance of particularly dangerous activities, special attention must be exercised, and this applied

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particularly to the use of explosives and explosive devices. Here the courts sometimes went a step further and imposed presumptive liability. Especially in cases of defective roads, pipelines and cables, the courts have also on occasion imposed presumptive liability where this is not regulated by law; but it cannot be said that general professional liability, including physicians' professional liability and hospital liability, has been extended to create a general presumptive liability. In other cases the courts have imposed liability for independent contractors, especially in cases concerning excavation and traffic disturbances; but also for anonymous faults. In more recent court practice a combination of these views has often been seen.

However, as already mentioned, it has not been possible to demonstrate in Danish court practice a general tendency to exceed the rule of negligence. If anything, recent years have shown a regression; at any rate more recent Danish Supreme Court decisions have drawn attention to the fact that the Court has been unwilling to accept liability for damages exceeding a strict rule of negligence for medical and industrial injuries.[9] The Supreme Court has here referred to the legislation and, indirectly, to the patient insurance which exists in Sweden.

This development coincides with a general reluctance of courts all over the world to undertake society's political function. Because of the burden of new legislation there has been a world tendency to use or abuse the courts for the solution of problems which the legislature has been unable to handle. Especially in the 1960s and at the beginning of the 1970s, courts became deeply involved in social and political evaluations in concrete cases. However, facing the risk of losing their position of general impartiality and reliability the courts have been observably reluctant, realizing that they lack the political authority to solve political problems. Even American courts have been more cautious during recent years, notwithstanding their traditionally greater political role occasioned by the federal social organization with no unifying internal political organization.[10] Therefore it is quite natural that, in the absence of special legal authority, the courts have refused to go very much further than a modernized rule of negligence, e.g. that of 1st January 1986 for motoring.

Thus it appears that tort rules, naturally, cannot be independent of social development, and that they do have a social function, which concerns the distribution of loss resulting from the more or less inevitable damage that occurs in society.

[9] See Supreme Court Justice Niels Pontoppidan in *UfR* 1985 B, p. 248.

[10] Jørgen Dalberg-Larsen and Stig Jørgensen, *Steuerungsprobleme in Skandinavien,* Siegen (HiMoN-DB), 1985, pp. 31 f., "Individual Rights and Contract", *Festschrift for Gray Dorsey* (forthcoming 1988), "Decline of Law as a Guiding Device", in *Limits of Law*, ed. Rüdiger Voigt, Siegen (forthcoming 1988), *Product Liability* (in print), see also Stig Jørgensen, *Reason and Reality*, Aarhus 1986, pp. 109–44.

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To understand the full extent of this risk distribution, it is not enough just to take an interest in the special history of tort rules—which, anyway, is not very long. Actually, tort law in a modern sense dates back only to the 17th and 18th centuries. Spiritually, modern tort law can be said to be a child of the rationalist natural law theory of that period. However, it was not until the middle of the 18th century that courts all over Europe, including Scandinavia, came to recognize a general tort rule based on negligence. Thus modern tort law is systematically connected with the individualistic legal system, which is the product of this natural law theory. Briefly, rationalist natural law was the result of the individualistic conception of man and society which, though originating in the Renaissance, did not manifest itself philosophically until the 17th and 18th centuries when contemporary social and legal theory grew out of the idea of individual sovereignty. Socially, this was reflected in the idea of democracy and the social contract, and in private law it was reflected in the principle of will (i.e. the principle in Danish law that a promise is binding because the promiser by making a promise has declared his will to fulfil it). Individual freedom is the basis of responsibility, as Kant put it at the end of the 18th century, and therefore good will is the basis of civil law matters, and evil will the basis of liability for damages.

This social and legal reasoning was natural for the growing urban middle classes in Europe, which were based on trade, commerce and shipping with the resulting division of labour and money economy, which attach to each individual a value that is related to his economic circumstances. However, this way of considering society and law was alien to the people of the Middle Ages and earlier, primitive, societies. Nomadic and agrarian societies are based on a collective conception of man and society. The individual has no particular value, but has duties and rights according to his status within the collective family organization. The economic base is the common yield of hunting or the common herd or flock, later of common farming. In such a collective society there is no need for an individual division of labour; nor, consequently, for contractual exchange of values or for money. Rights and duties are not attached to the individual, and this means that the family reacts and receives reactions. The characteristic feature of such societies is the absence of a real central social power to ensure the maintenance of peace and order and to sanction breaches of law, which thus become a private matter within and between individual families. One must imagine that, originally, collective revenge and feuding were the foundation of the system of reaction for the maintenance of peace and order, and were thus the manifestation of social law enforcement. At the stage when individual cultures enter history, it is seen everywhere from the Middle East to the North that the system of revenge has been replaced by a system of fines. This is true of Hammurabis' law from the 18th century B.C., of Mosaic law and, some centuries later in Athens, of Solon's reform laws of about 600 B.C.—a couple of hundred years before the

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Twelve Tables in Rome. We also can see that by the time the Nordic countries enter history with the provincial laws of the 12th and 13th centuries, everybody has accepted such a system of fines under which individual damages are transformed into fixed amounts. How this development took place, and why it seems to occur everywhere together with the introduction of writing and thus together with the historical debut of the culture concerned, are not known for certain. However, several things indicate a connection with the growth of certain rudimentary authorities for the settlement of conflicts between families and groups in the form of mediation and, later, arbitration. As the fixing of these amounts in practice became actual tariffs, they could be administered by court-like institutions such as *things*. Common to primitive societies are the collective, the concrete the objective elements. Characteristic of classical systems of fine is that fines are imposed by and upon families irrespective of the offender's person and his state of mind, and that actually the payment is to compensate partly for the offence and partly for the damage or injury sustained. It is not until a later stage in the development of society that the distinction arises between a criminal law, which turns on the offender and takes his guilt as its starting point, and a tort law which considers first and foremost the extent of the loss suffered though probably including the offender's guilt. An illustrative passage in Anders Sunesen's paraphrase to the Scanic Law deals with the principle of guilt recognized by the Church and the strict liability to fine realized in the provincial laws. It is true that Anders Sunesen maintains the theoretical validity of the principle of guilt, but he nevertheless recognizes the practical importance of a strict liability to fine, for, as he says, the injury is just as unpleasant to the injured person with or without negligence. This dialectic between the regard for the interest of the tortfeasor and the injured person is seen subsequently in theory as well as in practice. Although, as mentioned, rationalist natural law adopted the principle of liability based on negligence, it was not alien to a strict liability for damages, as not only the principles of reason and of will but also the principle of reciprocity were recognized as manifestations of justice. The modern contract law principle of reciprocity also stems from rationalist natural law, which developed the Aristotelian and mediaeval doctrine of fair price.

So we see the law of reaction, and especially the law of torts, constantly moving between two poles: consideration for the offender's state of mind and consequently for the idea of liability, and consideration for the injured person's state of mind and consequently for the idea of compensation. It is a blessing of modern times that by virtue of the development of the social system and insurance it has been possible to solve many of the risk problems which the law of reaction, and especially the law of torts, has had to solve throughout history. As long as we have an extensive social insurance system securing individuals and families against illness and accident, there will not be the same need for transferring these losses to potential tortfeasors.

The same is true of damage to property, which is covered by general

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insurance. However, it is normally possible to transfer certain losses to liability insurance, especially when certain types of activity are associated with particular occupational or identifiable-risk groups. Here I am thinking of industrial liability insurance and product liability insurance, motor third-party liability insurance, etc. Especially where the damage affects persons or goods not covered by first-party insurance, it is possible on the one hand, desirable on the other, that there be a liability insurance to cover these losses, and as a matter of fact liability insurance is often compulsory, as for instance in motor insurance. However, in the modern society there will always be considerable areas which are not covered by first-party insurance; thus countries do not usually introduce compulsory accident insurance for injuries sustained outside work and working hours, and compulsory property insurance exists only within certain limits (fire insurance of houses). To cover such damage, it will therefore be necessary to retain a private law tort liability, not so much for preventive reasons as for the consideration of reparation, as in our modern welfare society it has indeed become a predominant principal rule that individuals should be covered by individual or collective liability insurance. Where there is first-party insurance, there will in theory be double insurance if the liability is also covered by liability insurance. The response will in these cases often be a completely administrative settlement between the insurance companies. By and large, these make general recourse agreements excluding or limiting recourse claims, which do not normally influence the insurance companies' policies regarding premiums very much. The legislation has, however, introduced certain fundamental lines governing this general settlement of recourse.

In the Nordic countries it is a general rule that compensation payments for industrial injuries covered by compulsory national insurance are deducted from the injured person's claims for damages while at the same time the right of recourse of the national insurance has been abolished. As long as tort law damages do not exceed compulsory social insurance payments—which they normally do not in Denmark for instance—the tort law has in effect been eliminated. On the other hand, under the latest amendments in the legislation concerning tort law and insurance, the rule is still that private personal insurance payments are not deducted from the injured person's claim for damages, and consequently there is no resulting recourse claim as far as the insurance companies are concerned. In the case of property insurance, the Danish recourse rule in sec. 25(1) of the Insurance Act has now been replaced by a rule in sec. 19 of the Tort Act,[11] which in principle exempts the tortfeasor from paying compensation for injuries covered by a first-party insurance, unless the person liable in damages has acted intentionally or with gross negligence, or the injury has been caused by the performance of public or

[11] Statute No. 228, 23rd May 1984.

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occupational activity. The State is not only considered as self-insured, but also as primarily responsible, just as industrial insurance and product insurance have to bear their own damages. Under the new rule, motor third-party liability insurance, particularly, will have its damages transferred to the first-party insurance. Thus in future, apart from the State, it is only private enterprise which will have to bear its own liability for damages.

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