

# **Diversity and Unity**

## **In Search of a Pluralistic View on Problems in Tort Law**

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### **1 Pluralism in Law**

#### ***1.1 Multilayered Problems and Monistic Rules***

Tort law can be seen as a paradigmatic example of a legal field where a minimum of rules is supposed to solve a multitude of factual and legal problems. In some sense this unity can be seen as positive, but problems arise when the unity tends to implicate normative proportions. When certain relations and factors only can be seen as a typical case, instead of many different relational problems, the unity in tort law becomes an obstacle to legal reasoning. The question can be raised whether ideas from contemporary theory of science can help us revealing and understanding more of the pluralism within legal discourse. As an applicable example I have chosen the problem of third party losses. The aim is though not to solve the whole problem on a few pages. The example is chosen merely to illustrate how a well-known principal rule and a so-called established solution can be “unfixed”; thereby we can get a starting-point for finding more and more layers and perspectives of legal reasoning in this field on the borderline between the law of torts and the law of contracts.

Diversity and pluralism can be a cure against too monistic legal theories. At least among legal scholars there is a growing consciousness that one should not always view the legal system so systematic and logical as it was considered a generation ago. It is more like a structure of openness. We have become more aware of the discursive nature of law and of the fact that legal reasoning consists of more, or other things, than logical deductions under a given hierarchy of axioms. This applies to the system as a whole; but the open-mindedness about the complexity of arguments and values is important also when specific problems within the system, for example in private law, are discussed. If it was characteristic of the old tradition of legal science to establish more or less clear-cut formulas, modern – some would say postmodern – science is open for a more

diverse and discursive way of understanding legal issues. By paying attention to the discourse and to the values, which are conveyed to us through language, we can reveal the diverse arguments regarding specific problems.

In a problematic field of law – that is, in other cases than those which appear in the textbooks for beginners – there is always a large quantity of legal arguments and factual circumstances. Therefore we would fool ourselves if we tried to understand the multitudes as a clear map or system, where there is a top from where to deduct and understand it all. It is often more interesting to formulate the questions in a field – for example about a specific problem in tort law – than to identify the (single) right answer or formula.

When dealing with new pluralistic movements, the “Critical Contract Law” should be mentioned. This movement questions, for example, the homogeneous nature of the legal system; thus a more dynamic and multilayered attitude to legal problems is favoured.<sup>1</sup> The recognition of the welfare state and its significance in dealing with traditional values is also a matter of concern.<sup>2</sup> Another tendency is the “Legal Polycentricity” with its pluralistic view of the legal phenomena.<sup>3</sup> One idea is that we cannot establish, to the same extent as before, a clear-cut hierarchy of rules and other legal material. These insights can pave the way for a more flexible attitude to legal theory; several legal discourses can exist simultaneously. There are some stories about law, and it is a question of interpretation and power which story, or discourse, that will be regarded as the leading one. But it is not always possible to give preference to just one way of establishing discourses. In American jurisprudence attention has been directed from the traditional questions about the nature of law, the universal legal method which should give the right answers and so on, to questions about the relation between law and topics such as culture, politics and economy.<sup>4</sup> The law is considered as one of several discursive components within society. The modernistic – or traditional scientific – effort to create an unambiguous system has been dismissed as yet another “Grand Theory” or “Metanarrative”. The idea of a stable foundation is criticised, especially by the movement called “Critical

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<sup>1</sup> See e.g. Wilhelmsson (ed.), *Perspectives of Critical Contract Law* (Aldershot 1993), especially Pöyhönen, *Contracts – Just Social Practice* pp 311 ff and 321 ff; Wilhelmsson, *Questions for a Critical Contract Law* pp 15 ff and 38 ff. See also Collins, *The Law of Contract* (3rd ed., London 1997), especially pp 21 ff.

<sup>2</sup> See e.g. Brownsword et al (ed.), *Welfarism in Contract Law* (Aldershot 1994). See also Bauman, *Postmodernity and its Discontents* (Cambridge 1997) pp 35 ff; Smart, *Postmodernity* (London 1993) pp 43-4 and 62 ff, about the welfare state and postmodern sociology.

<sup>3</sup> See e.g. Petersen et al (ed.), *Legal Polycentricity: Consequences of Pluralism in Law* (Aldershot 1995). See also the inaugural Griffiths, *What is Legal Pluralism?* (JLP 1986 pp 1 ff).

<sup>4</sup> See further Minda, *Postmodern Legal Movements* (New York–London 1995) pp 62 ff and 189 ff. For a brief overview, see also Minda, *Jurisprudence at Century’s End* (JLE 1993) pp 31 ff and 36 ff.

Legal Studies” (CLS).<sup>5</sup> At least earlier, in the 1970’s, an “indeterminacy”-thesis was asserted, i.e. it was held that no safe ground or coherent system could guarantee deductive and certain solutions at all. An early, more destructive, way of defending this thesis was to undermine all legal thinking and to reveal its contradictory features – this strategy was called “trashing”. Nowadays, it is more common to expose the contradictions as a first step and then proceed to examine how the legal discourse defines and reproduces the cultural values of the society.

## 1.2 Pluralism in Private Law

In private law it could be a pluralistic project to permit new tendencies and values to rise to the surface without being repressed by traditional modes of thought. If we admit that there does not exist any overall rule or way of justification – or ultimate method – within any sphere of law, we have the opportunity to construct a more open and dynamic pattern of the principles, policies and guidelines that are currently applied in legal discourse. Instead of holding on to just one explanation and one principal rule, we can disclose the pieces that together form the whole picture.

A critical approach in these fields of law can be a reading of the traditional texts in order to see where the texts are beginning to run (or write) against themselves.<sup>6</sup> If the texts for example both maintain some formula of explanation and make tacit assumptions as to the occurrence of other values, fissures do appear. With eyes wide open these fissures can be a gateway into a more complex and diverse conception of the legal frame. The fissures are often placed where authors and judges try their best to get rid of the problems within the traditional paradigm – by using an extra amount of words and explanations to justify the usefulness of traditional concepts.<sup>7</sup> And thereby it can be exhibited that the principal rules and monistic theories, which govern the traditional paradigm, have grave difficulties in actually dealing with concrete cases.

Thus we can often see other values that are governing the domain, or at least we can note the traces of other discourses. For example it can be displayed how contract law is upheld by a theory which stresses the free will of the parties; however, in certain cases this theory works as a disguise for other decisive, and often more objective, values. And in tort law the traditional test of foreseeability often can be revealed as being a disguise for a much more complex discourse when dealing with problems of causation and liability. By throwing down some traditional pillars, it becomes possible to open up for new perspectives and new

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<sup>5</sup> See e.g. Hunt, *The Theory of Critical Legal Studies* (OJLS 1986 pp 1 ff); Minda, *Postmodern Legal Movements* pp 106 ff; Unger, *The Critical Legal Studies Movement* (HLR 1983 pp 561 ff).

<sup>6</sup> Cf. Derrida, *Writing and Difference* (London 1978) pp 252-3 and 260.

<sup>7</sup> Of course it is also possible to detect fissures in the tacit assumptions that might lie behind the text or – as Derrida says – are situated in the margins. Cf. Derrida, *Margins of Philosophy* (Chicago 1982) pp x-xi, xv ff, xxiii and 24 ff; Derrida, *Of Grammatology* (corrected ed., Baltimore–London 1997) pp 101 and 200-201.

questions. From the deconstructed fragments one can begin to formulate new tentative concepts, rules and exceptions that maybe will work better than the previous. The task for legal science is to maintain a critical approach to the analysis of law in order to understand in what direction the discourse is turning.

## 2 Diversity in Modern Science and Philosophy

### 2.1 The Pluralistic Approach

After the great Systems and Grand Narratives we nowadays often find a tendency to a more open and anti-axiomatic way of reasoning. Under labels as postmodernism or poststructuralism<sup>8</sup> we find critical movements that could be of some interest for legal science. I will focus on a very brief outline, however an outline that raises the questions of interest for the legal discourse here mentioned.<sup>9</sup> These tendencies – postmodern or whatever label you would like to use – may be explained as a devotion to multiplicity, openness, creativeness and to criticism of foundationalism (fundamentalism included).

Instead of an urge for unity and identity, the “differences” and their “play” are emphasised.<sup>10</sup> This is connected to features which deal with the urge for plurality, the criticism of foundations and the scepticism towards formalism and various authority pretensions.<sup>11</sup> This critical attitude to ultimate foundations, to evident authorities, to unambiguity in discourse and to the problematic concept of truth is a characteristic feature of our time. And linked to this attitude are openness to plurality, multiple possibilities of interpretation and on the whole pluralism when estimating values and theoretical aspects. As a response to the fragmentation of society and its values, a differentiated reflexive discourse is favoured to the other possibility, i.e. the reaffirmation of foundationalism and universalising tendencies.<sup>12</sup>

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<sup>8</sup> I will use the first notion because the term “poststructuralism” is hardly ever used in France, although the movement is associated so strongly with French philosophers. As a matter of fact the word “postmodernism” – although not new even then – first started to become currently used in America in the 1970’s. But it was with Lyotard’s famous *The Postmodern Condition: A Report on Knowledge* (first published in French 1979) that the word was established and secured its world-wide use. See Lyotard, *The Postmodern Condition* (Manchester 1984) pp xxiii ff, on the origin of the word.

<sup>9</sup> See H Andersson, *Constructive Deconstruction* (in Anglo-Swedish Studies in Law, Ed. Andenas-Jareborg, Uppsala 1999, pp 356 ff) pp 358 ff, on postmodernity and law.

<sup>10</sup> See Jameson, Jameson, *Postmodernism or The Cultural Logic of Late Capitalism* (4th printing, London–New York 1996) pp 340 ff. See also below, 2.2, on Derrida.

<sup>11</sup> See e.g. Appignanesi, *Postmodernism* (Cambridge 1995) pp 70 ff; Derrida, *Of Grammatology* pp 87, 99 and 101 ff; Derrida, *Writing and Difference* pp 3 ff, 26-7 and 278 ff.

<sup>12</sup> Smart, *Postmodernity* pp 70-71 and 76.

The open system – or structure – without centre is introduced.<sup>13</sup> According to postmodern theory there is no ultimate individual foundation, rule, principle or formula which can explain everything. Catchwords such as “instability”,<sup>14</sup> “indeterminacy” and “antifoundationalism” are depicting this idea. When realising the many aspects, we cannot simply describe our reality in a deductive manner where everything is clear and where logical conclusions always can be drawn from a system with given axioms at the top. A pluralistic approach means that we have to open our eyes to the living life as it occurs to us – that is, as a mass of confusion and contradictions. Rational thought looks for identity and unity, but when pressing down that identity aim over the multitudes of life, we are running the risk of not seeing the actual differentiated life but only the “Logos”, the rationalisation of all differences.<sup>15</sup> In this way our paradigms could be seen as stories about what can be told and what we cannot talk about, since it is suppressed to be irrelevant, to be an exception – nothing being worth talking or thinking about.

The critical aim of a pluralistic theory is to disclose and rearrange this kind of suppression of other thoughts and ideas than the traditional. Instead of focusing our whole attention on data, we can widen the scope of our perspective and look also at the narratives where these data actually are being used. Both reality and reasoning – especially legal reasoning – contains multitudes. We cannot explain all this with reference to a universal concept or rule. The above-mentioned rationalistic general account of reasoning will have to be exchanged for a microphysics of discourse – including the power over the discourse.<sup>16</sup> For example, within legal reasoning we can look for different ways in which relations and circumstances are transformed into images of various kinds.

## 2.2 Deconstruction and Law

A working tool for opening up the diversity of legal reasoning can be Derrida’s so called deconstruction. The highly controversial Jacques Derrida<sup>17</sup> is renowned for his questioning and disruption of the doctrinaire science and philosophy with its pretensions to tell truths with complete assurance. The distinctive features of Derrida’s efforts is that he traces the “logocentrism”, i.e. the quest for an ultimate ground, a core of truth and rationality upon which science is said to be built. Although Derrida has never written a conclusive

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<sup>13</sup> Cf. Derrida, *Writing and Difference* pp 292-3 and 297; Lyotard, *The Postmodern Condition* p 64.

<sup>14</sup> Lyotard, *The Postmodern Condition* pp 53 ff.

<sup>15</sup> Cf. Derrida, *Positions* pp 44 ff.

<sup>16</sup> See further Foucault, *Power/Knowledge* (New York 1980) pp 78 ff and 109 ff; Lyotard, *The Postmodern Condition* pp 47 and 61 ff; Sturrock, *Structuralism* (2nd ed., London 1993) pp 67-8. Cf. Bauman, *Postmodernism and its Discontents* (Cambridge 1997) pp 112 ff.

<sup>17</sup> For the debate on the pros and cons in Derrida’s writing, see e.g. Ellis, *Against Deconstruction* (Princeton 1989); Norris, *Derrida* (London 1987).

summary or methodological synthesis of his concepts and strategies,<sup>18</sup> at least from reading his applications we can get inspiration to tack some ideas together in order for us to elaborate on our own strategies in dealing with different problems in science – for example within legal science.<sup>19</sup>

As a replacement for the traditional quest for unity and for a frame to place everything within, Derrida introduces the thinking of differences – “Différance”.<sup>20</sup> Différance is not a genuine French word, but is created by Derrida to mean both to differ and to defer. To differ – the movement of “spacing” – is to see the differences, that which is not identical;<sup>21</sup> and to defer – the movement of “temporisation” – is to take recourse in the temporal mediation and to part from an “originary” and indivisible unity of meaning.<sup>22</sup> Instead of seeing one absolute core of every fact and situation, his deconstruction starts the process of differing this core into its opposite parts. In short, Différance states that meaning is derived from difference – not from sameness – and meaning is never fully present but is always deferred i.e. postponed.

Derrida demonstrates how binary oppositions have governed our traditional way of thinking ever since Plato, even – or especially – in science and philosophy.<sup>23</sup> Pairs such as true-false, high-low, positive-negative, male-female, inside-outside, presence-absence and so forth are guiding the scientific thought.<sup>24</sup> And the interesting point is that the logocentric tradition always tends to privilege one of the terms (in the above examples the first notion) so that the other term gets subordinated and eventually suppressed as the exception, as the irrelevant, as “the Other” – or even downright as Unreason. In this procedure the suppressed notion is put outside what will be referred to as the rational discourse. But the second part of the binary opposition will – almost in clandestine – continue to serve as a “dangerous supplement”.<sup>25</sup> Hence this silent absent element undermines the certainties of the discourse.<sup>26</sup> After marking this

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<sup>18</sup> He has, however, made some more easily comprehensible explanations in his interviews. See the two collections of interviews, *Positions* (London 1972) and *Points...* (Stanford 1995). Maybe we also can see the essays *Différance* (in *Margins of Philosophy*) and *Structure, Sign and Play in the Discourse of the Human Sciences* (in *Writing and Difference*) as some kind of summaries; see also Part I (*Writing before the Letter*) in “Of Grammatology”.

<sup>19</sup> See H Andersson, *Constructive Deconstruction* pp 364 ff, on deconstruction and law.

<sup>20</sup> See Derrida, *Margins of Philosophy* pp 3 ff; Derrida, *Of Grammatology* pp 65 ff.

<sup>21</sup> From the structuralistic tradition it is, for example, common not to point out the essence of a sign or a thing – what “it is” – but instead to find in the system of differences the “value” or “meaning” in what “it is not”. In language there is only differences. Consequently there are not either any positive notions or definitions. See further Palmer, *Structuralism and Poststructuralism* (New York 1997) pp 13 ff; Sturrock, *Structuralism* pp 19-20.

<sup>22</sup> Derrida, *Margins of Philosophy* pp 7-8 and 14-5; Derrida, *Positions* pp 8-9, 81-2 and 106-7.

<sup>23</sup> Derrida, *Margins of Philosophy* p 17. Cf. Derrida, *Of Grammatology* pp 216 ff and 258 ff.

<sup>24</sup> This preference for thinking in terms of binarisms is an obvious characteristic of the structuralistic movement. See Appignanesi, *Postmodernism* pp 60 and 67 ff; Sturrock, *Structuralism* pp 30, 44, 51 and 161.

<sup>25</sup> Derrida, *Of Grammatology* pp 141 ff and 157 ff.

<sup>26</sup> The connection to Freud’s thoughts regarding the unconsciousness is obvious. Cf. Derrida, *Margins of Philosophy* pp 18 f; Derrida, *Writing and Difference* pp 196 ff. See also Palmer,

double play, deconstruction emphasises an overturning of the binarism. Thus the undecidability can prepare the way for an exposure of the prejudices within the metaphysical tradition.<sup>27</sup> Deconstruction is not the same as a simple reversal of the binarism through which the suppressed part, rather than its contrasting term, is ascribed the status as the Truth. Deconstruction is rather the starting-point for a careful investigation, or discourse, about the themes considered.<sup>28</sup> The tentative overturning exhibits that there are other possible orders than the prevailing. And with this in mind the “either-or-choices” can be articulated and maybe give incitement to view the difference as such – Différance – as the important issue.<sup>29</sup>

Through deconstruction we can locate the above-mentioned “fissures” in the scientific web. Within a tradition and within an individual text, we can search for the points where the text – or the whole discourse – starts to slide, i.e. starts to show its internal fissures and its difficulties in upholding the rational unity.<sup>30</sup> By locating signs of the dangerous supplement, ideologies could be unmasked and binarisms revealed as being built upon unconscious – maybe false – distinctions. In this sense Derrida’s project is not to establish, in a positive way, a new distinct system or regime of truth. It is, and has always been, a critical movement urging to destabilise the false certainties afflicting science.

Maybe it is up to us in a specific field of science (for example legal science) to develop for a specific problem (for example the third party losses) more positive results. We will have to demonstrate the pluralistic play of differences in a more concrete way. When one sees the concrete binarisms it will be possible to see a multitude of new questions, not just the single question – or even worse, the single answer – one had before. Hence the play of binarisms opens up for a creation of new interpretations.

### 3 A Pluralistic Approach to Third Party Losses

#### 3.1 The Problem

The factual situation in most third party cases is as follows. A person (A) has damaged another person’s (B) property. B has a contractual relation with a third person (C). As a result of the damage caused by A to B, the contract-partner C has suffered economic loss. In relation to the initial damage, made by A to B, we can consider C as a third party. In all Western legal systems there is a distinct principal rule – “The Bright Line Rule”: The third party will not obtain any

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*Structuralism and Poststructuralism* pp 66 ff; Sturrock, *Structuralism* pp 95 ff, about Freud’s influence upon the structuralists.

<sup>27</sup> Derrida, *Positions* pp 6-7, 19-20, 35-6 and 68-9.

<sup>28</sup> Cf. Derrida, *Of Grammatology* pp 13-4 and 315-6.

<sup>29</sup> Cf. Derrida, *Positions* pp 40 ff.

<sup>30</sup> Cf. Derrida, *Writing and Difference* pp 263-4, 267-8 and 270 ff.

compensation.<sup>31</sup> But, as we shall see, there are sometimes exceptions – and the problem is how to know when and why there is an exception (i.e. the questions whether a concrete situation could be qualified as a possible exception and which arguments that can make a claim for compensation in such a case).

The most famous English example is *Spartan Steel & Alloys Ltd v. Martin & Co. Ltd* (1973). An electric cable belonging to B was damaged by A. The cable led to C (the Spartan Steel plant). The loss of electricity caused physical damage to products in the process due to a meltdown, and a standstill caused C economic loss. C obtained compensation for the damage to property, caused by the meltdown, as the company owned that property, but no compensation was awarded for the standstill. Regarding that loss C was a third party, only affected indirectly by the initial damage to the cable. A similar Swedish case, with the same outcome, is NJA 1988 s 62. There are numerous similar cases from different jurisdictions.

So why is this really a problem? There is a distinct principal rule, it is easy to predict the outcome of a case and the tradition of this kind of argumentation is old and well known. However, the problems arise when considering that the solutions in individual cases often can be seen as quite arbitrary. C could as well be the owner of the cable, the damage to C's property can exceed the loss C has suffered due to the standstill, the relation between B and C could be so close that C's interest in B's property as a matter of fact is stronger than B's own interest and so forth. And the fact remains, exceptions are sometimes being made, but it is often difficult to give the reason why. There are many other diverse situations of three party relations. The same rule is nevertheless always applied – that is, even in situations where the factual circumstances diverge from those of the mentioned typical cases.

So we might agree upon “similar rules for similar cases”, but when the situations in fact are not similar, the fair solution should not always be “similar rules for all cases” but “different rules for different cases”. However, the bright line rule prevents such a differentiated reasoning. The aim for legal science must therefore – in my opinion – be to create a theoretical and methodological approach that permits us to see the whole pattern and give us guidance in concrete cases.

### **3.2 The Pluralistic Approach**

The legal discourse regarding third party cases is full of different facts and arguments. One important preoccupation in theory nowadays is precisely to view the multiplicity of reality and our knowledge of it, instead of resorting to the traditional so-called rationalistic efforts to establish an ultimate clear-cut single formulation of a problem. These insights might help us in getting good

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<sup>31</sup> See e.g. Hellner, *Skadeståndsrätt* (5th ed., Stockholm 1995) pp 362 ff; Markesinis–Deakin, *Tort Law* (3rd ed., Oxford 1994) pp 105 ff. For a brief comparative general view, see my book H Andersson, *Trepartsrelationer i skadeståndsrätten* (roughly “Three Party Relations in Tort Law”) (Uppsala 1997) pp 23 ff.



descriptions and some practical guidance when considering this multitudinous sphere of legal problems. The problem for legal reasoning is that the cases involve several different factual situations and circumstances together with several different policies, arguments, principles etc. Accordingly the question is how we within legal science can bring this to light without telling lies about the one and only so-called true rule, the true story and the ultimate formula and so on. In darkness all cats are grey; what we need is therefore such enlightenment – openness to diversity – so we can see the striped cats. Maybe it is like putting the cat among the pigeons or at least waiting for the cat to jump. I call this strategy the methodology of the striped cats.<sup>32</sup>

As mentioned there is a principal rule – the rule of non-compensation to third parties. But it is also recognised that there exist a number of more or less obscure exceptions. In Scandinavia the exceptions are formulated under headings such as “close concrete interest” etc.<sup>33</sup> The Anglo-American tradition on the other hand has tried to specify the exceptions, even though some efforts also have been made in order to formulate more general guidelines.<sup>34</sup> Whereas the British principal rule is quite strict, a more flexible approach has been adopted in other parts of the Commonwealth.<sup>35</sup> As just mentioned we consider the exceptions as in some way obscure, and precisely because the tradition has offered us exclusively one rational discourse to apply. The tradition has given us the idea of one rational solution and hence placed the play of differences in the background.

Thus we have conceived certain paradigms, dogmas and concepts. These should – in my opinion – be able to serve both on a level of explanation and on a level of justification. The explanations focus on the factual level of concrete cases, and the goal is to predict and account for the outcome due to specified circumstances. The justifications focus on the normative level of arguments, and the goal is to find justificatory arguments and principles, formulating why the outcome will be this or that. Of course, there is an interaction between the levels, so that a particular argument can be given explanatory power. But if the justification of the rule or the argument begins to live a life of its own, problems can arise. There will be risk that the “good formula” of justification will take over the legal reasoning in an abstract way and be used not only as a justification, but also as an explanation without the above-mentioned concrete

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<sup>32</sup> See H Andersson, *Trepartsrelationer i skadeståndsrätten* p 38. The method is named after and dedicated to my beloved Gustav.

<sup>33</sup> As for Denmark, see Vinding Kruse, *Erstatningsretten* (5th ed., Copenhagen 1989) pp 298 ff; for Finland, Saxén, *Skadeståndsrätt* (Åbo 1975) pp 77 ff; for Norway, Nygaard, *Skade og ansvar* (4th ed., Bergen 1992) pp 362 ff; for Sweden, Hellner, *Skadeståndsrätt* pp 362 ff.

<sup>34</sup> See e.g. Clerk-Lindsell, *On Torts* (17th ed., Ed. Brazier, London 1995) pp 272 ff; Feldthusen, *Economic Negligence* (3rd ed., Ontario 1994) pp 208-9 and 221 ff; Markesinis-Deakin, *Tort Law* pp 105 ff.

<sup>35</sup> The famous cases are *Caltex Oil Pty Ltd v. Dredge Willemstad* (1976, Australia) and *Canadian National Railway v. Norsk Pacific Steamship Co.* (1992, Canada). See further Feldthusen, *Economic Loss in the Supreme Court of Canada* (CBLJ 1991) pp 356 ff; Trindade-Cane, *The Law of Torts in Australia* (2nd ed., Melbourne 1993) pp 349 ff.

examination of circumstances in the individual case. In other words we would explain a concrete situation with a higher and universally applicable formula or reason which always would work – because it does not tell us anything. We will fool ourselves if we think that we, by using these words or abstract “good reasons”, actually understand or even really talk about the concrete legal problems. Concepts such as indirect causation, guilt and foreseeability are easy to grasp – we naively think. But instead of saying anything about decisive elements in the discourse, the risk is that we by using – abusing – these concepts are leaving the concrete actual problems behind us and merely dig into our man-made images.

Therefore, the justifications on a higher level – the level of normative justification<sup>36</sup> – must be connected with the explanations on the level of concrete factual situations, relations and events – the level of explanation of factual situations.<sup>37</sup> In a sense of realism and pluralism, we should distinguish the level of facts (different types of situations and relations) from the level of normativity (rules, principles, policies etc.). Justifications and rules should in a specified play of differences be directed to explanations and facts. From an analysis of facts (i.e. cases and the concrete facts of these cases) it thus can be possible to proceed to establishing the legal patterns of rule justification. There is no beginning and no end. The starting-point can be neither a simple deduction from a safe normative axiom, nor an induction from a factual situation only. It is a play between the abstract and the concrete, and it is not possible to privilege one part of the binarism as the origin of the play. The play between these levels cannot be stopped. We are positioned in a sequence of the play, and we will have to try to examine and to understand our discourse without reference to a given ideal primordial logical system that actually would contain all the answers to our questions.

Pluralism could be used in this field in order to deconstruct the many facets of factual and normative elements. As a replacement for the one and only overall rule – or justification – we can try to construct a pattern of principles, policies, and guidelines that are being considered by the courts in cases dealing with third party losses. Instead of holding on solely to the arguments supporting the principal rule – arguments that actually are putting the decisive moments in disguise – we accordingly can disclose the pieces which put together create the whole picture. And on the factual level, we also have to establish the diverse pieces. If we have been used to simply view a situation as yet another ordinary “third party case”, we now will have to distinguish what kind of specific facts, situations and relations that are being examined in different cases. By observing the levels of both facts and justifications, the subsequent step will be to view combinations of facts and principles that often are being used together in real cases. The creative task is to formulate a scheme of the differentiated pattern of solutions, which appears in these cases, i.e. compensation or non-compensation for different kind of circumstances.

### **3.3 *The Level of Normative Justification – Diversity in Reasoning***

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<sup>36</sup> See below, 3.3, about this level.

<sup>37</sup> See below, 3.4, about this level.

Let us now take a glance at the various arguments that have been submitted in different situations. As a matter of fact, these arguments often serve as justification for the principal rule of non-compensation, but we could also see them as themes fitting together in the play of differences. A critical approach in this field means that we will look for where the traditional stories of the principal rule and its justifications start to run against themselves. The fissures in the web are detectable when the arguments also could give solutions the other way round. If we try to understand these arguments and policy-considerations as responses to questions about three party relations, we can hear behind the clear and loud melody – as in disguise – dissonances and second themes that tell us a story about “for and against” compensation according to a multitude of different situations. In some sense each argument can be seen as working against the principal rule of non-compensation, and accordingly each argument also can be regarded as working against itself.

Thereby the differentiated analysis – or deconstruction if that term is preferred – undermines the certainty, regarding the principal rule as well as each individual argument. For example, if it is obvious that a certain argument supporting the principal rule exclusively can explain factual situations of only a certain kind, perhaps we can conclude that if the facts would be the other way round the argument actually could be – and in some cases is being – used to make a case for compensation. In such situations our strategy can display how the privileged formulation of the situation is undermined and how the principal rule and its justifications – foreseeability and so on – do not have monopoly as dominating themes.

Of course we cannot simply make fantasies and ideal systems out of our own will; instead we must show that there is, as a matter of fact, such situations (cases) where compensation have been awarded – and that we can explain these exceptions by using ideas in accordance with the particular themes in the exposed open pattern of legal reasoning. In the following I will make a brief outline of the arguments most frequently assumed upholding the principal rule. The outline is not in any sense exhaustive. The purpose of this paper is merely to point out that analyses of legal reasoning can pick up some of the ideas of diversity, and as a result improve the understanding of concrete problems and cases.

The basic idea is as follows. First I will try to establish the frequent arguments, numbered from (1) to (7). For each argument I will try to display how it does not always work in the proposed way of supporting the principal rule. Thus, when this play of differences is released, we can try to see the issue that has given rise to the initial “either-or-binarism” (where “either” is the principal rule with its certainty and “or” are the suppressed ideas of exceptions with their ambiguity). At least we accordingly can exhibit some themes that are being used, even if the themes in themselves do not always support the principal rule. By now it should be obvious that the themes will not be put together so as to form a formal, logical and rational system, with easy deductions as results.

(1) One important way of justifying the principal rule of non-compensation is to submit the “*floodgate argument*”, i.e. the idea that we would get an unlimited

chain of claims for compensation if strict borders were not upheld.<sup>38</sup> The argument is connected with risks inherent in an unlimited compensation to third parties. This kind of reasoning is often used even in cases where, for instance, a third party is the only one who has – and the only one who ever could have – suffered any damage at all. When the argument thus is submitted also in situations where it is not always relevant, one begins to suspect that the clear-cut argument actually has become a facade preventing us from seeing the differentiated situations. Thus the argument rather helps the traditional discourse not to lose the grip. It is a typical example of an either-or-situation where the binarism's first distinct formulation has dominated the field for so long that we are not able anymore to see the other side of the binary pair. The floodgate argument has thus become a formula saying that we must choose, between “no compensation at all” and “compensation to all”; the first notion has then been chosen. But can we really be sure that a mass of claims would be the result of some minor adjustments of the principal rule?<sup>39</sup> When not paying attention to all the differences, we have become accustomed to view as natural that “everything else” than “nothing” (no compensation at all) would lead to “everything” (compensation to all). This is the dilemma, and since the play of differences is not allowed, this line of argumentation will continue to suppress cases where the theme of restricting the borders is not actually relevant.

(2) In English debate – and sometimes also in early Scandinavian doctrine – we meet the argument, that since C has no “*right*” to be protected by A, A has no “*duty of care*” in relation to C.<sup>40</sup> For a Swedish jurist, accustomed to the tradition of legal realism, this kind of argumentation seems almost absurd. It is like beginning with telling the answer before the question is being put forward with all its details. Instead, the question should be posed with reference to what kind of facts and relations that give rise to what we perhaps might call a “*right*” (even though I personally prefer avoiding the notion at all). Hence one should not simply say, that C will obtain no compensation and that he cannot have any right and therefore A has no duty (and accordingly since A has no duty, C has no right – and so on in the merry-go-round).

(3) Another argument is connected with *foreseeability and efficiency*. In accordance with the “All-or-Nothing Approach”, discussed under (1), it is argued that the principal rule is efficient and easy to apply. If we have one simple rule, parties do not have to go to court. They, or their lawyers, know the outcome anyway – this is sometimes called “the administrative factor”.<sup>41</sup> This argument could seem practical, but is it really in accordance with the overall

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<sup>38</sup> See e.g. Feldthusen, *Economic Negligence* pp 11 ff and 211 ff.

<sup>39</sup> Cf. Marshall, *Liability for Pure Economic Loss Negligently Caused – French and English Law Compared* (ICLQ 1975) pp 750-51; Stevens, *Negligent Acts Causing Pure Financial Loss: Policy Factors at Work* (UTLJ 1973) p 453.

<sup>40</sup> See e.g. Benson, *The Basis for Excluding Liability for Economic Loss in Tort Law* (in *Philosophical Foundations of Tort Law*, Ed Owen, Oxford 1995) pp 437 ff and 444 ff; Dworkin, *Taking Rights Seriously* (7th ed., London 1994) pp 84 ff.

<sup>41</sup> See Lawson-Markesinis, *Tortious Liability for Unintentional Harm* (Cambridge 1982) pp 45 ff.

values of tort law? If the theme of efficiency would prevail, the most easy rule to handle – in the whole tort law, not only in third party cases – would be that no one whatsoever shall be awarded compensation and hence everybody shall arrange for their own insurance.<sup>42</sup> The argument starts running against it self since there are also other values in tort law which cannot be upheld if this easy way out is chosen. Holding strict to an old principal rule also seems a bit conservative. If no rules can be changed in accordance with the overall development of society and law, legal theory would be no more than an obstruction.<sup>43</sup> We can also in certain cases see the arbitrariness of the clear-cut solution when similar situations are given different solutions – and different situations still are leading to one and the same solution – only justified by the argument that it is easy to have one single rule for all cases. Simplicity may not be the answer to multilayered problems. If the differences between the situations are seriously considered, and if we clearly can depict the decisive circumstances in different situations, there would not be such a strong case for homogeneous argumentation and rules.

(4) It is sometimes – mainly within Anglo-American law – argued that the principal rule must be upheld because of its connection with the *concept of pure economic loss*.<sup>44</sup> Since the loss that the third party has suffered is pecuniary and not physical, the damage is – at least from the victim’s standpoint – almost “pure” in the above-mentioned sense. The problem regarding this argument is that the rule about non-compensation for pure economic loss is linked to acts of the tortfeasor which usually are permitted. But in a case where there is an initial physical damage (the damage that A has caused to B) the tortfeasor’s negligent act is one that normally would lead to liability. The argument consequently begins to undermine itself. The tortfeasor is being relieved from liability by an accidental circumstance which has nothing to do with his act. And even in respect of initial pure economic losses, there has been a development towards compensation in certain cases;<sup>45</sup> and this development could weaken the impact of the connection between pure economic losses and third party losses. However, this development has lately been interrupted by a more conservative backlash in England<sup>46</sup> – we will have to wait and see the future outcome.

(5) One further example of the argumentation in support of the principal rule is connected with each party’s possibility of *self-protection and insurance*. It is sometimes argued that each party is nearest to bear his own risks, and therefore should get incitements to protect himself by different measures, including

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<sup>42</sup> See further below in this section, (5).

<sup>43</sup> Cf. the wisdom in the following quotation. Cane, *Tort Law and Economic Interests* (2nd ed., Oxford 1996) p 454: “The fact that a rule is old does not mean that it should be allowed to grow even older.”

<sup>44</sup> Cf. Clerk–Lindsell, *On Torts* pp 271 ff; Feldthusen, *Economic Negligence* pp 212 ff; Hellner, *Skadeståndsrätt* p 363.

<sup>45</sup> Clerk–Lindsell, *On Torts* pp 277 ff; Hellner, *Skadeståndsrätt* pp 71 ff; Kleineman, *Ren förmögenhetsskada* (Stockholm 1987), *passim*.

<sup>46</sup> Clerk–Lindsell, *On Torts* pp 314 ff; Markesinis–Deakin, *Tort Law* pp 117-8.

insurance.<sup>47</sup> But in many cases the third party has no possibility at all to arrange such protection, so the argument of protection could be used as well to support the claim of the party without the mentioned possibility. Furthermore, it can be questioned whether it is most convincing to give the tortfeasor or to give the victim the incitements; the deterrent function of tort law should not be completely abandoned. And it is not always more efficient for the victim to arrange the insurance issue.<sup>48</sup> In short, this kind of argumentation forms a part of the discussion about the pros and cons of economic analyses in law. Some find such economic arguments strong, others maintain the view that the law of torts consists of more than considerations regarding economic efficiency. In any case this debate is general in that it relates to absolutely all cases in tort law – and thus can not be specifically related to the problem of third party losses.<sup>49</sup>

(6) The principal rule is also supported by arguments connected with the *contractual arrangements* (and possibilities). Tort law and contract law inevitably overlaps each other,<sup>50</sup> and this fact can give rise to arguments in borderline cases. A catchword in this field is “privity“. In economic analyses of law, it is often assumed that contract is the main way for protection of individual interests.<sup>51</sup> As mentioned above, a contract party could provide himself with protection – i.e. compensation – from the other party. If he has not done so, the question is why the law of tort should intervene and provide him with the protection he could have procured himself. This kind of argumentation, though, only considers circumstances on the victim’s side. But the most common arguments about liability are connected with the tortfeasor’s side. This means that, if that argument is used too frequently we are undermining the traditional law of negligence. It could be questioned why the tortfeasor, A, who has negligently caused physical damage to B, should be relieved simply because B and C could have made arrangements that would have made B responsible to C. Further it is not always a possible and economic rational choice for contractual parties to negotiate about the consequences of all possible damage (including those made by A).<sup>52</sup>

(7) Finally<sup>53</sup> arguments connected with theories about *restrictions on liability* (causation, “remoteness of damage”, “proximate cause” and so on) are submitted in support of the principal rule. This is, though, problematic since losses suffered

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<sup>47</sup> See e.g. Cane, *Tort Law and Economic Interests* pp 423 ff and 457-8; Feldthusen, *Economic Negligence* pp 217 ff and 221.

<sup>48</sup> Cf. Markesinis–Deakin, *Tort Law* p 111.

<sup>49</sup> See Benson, *The Basis for Excluding Liability for Economic Loss in Tort Law* pp 431-2 and 458, about the problems for economic analyses to explain, for example, third party losses.

<sup>50</sup> Hellner, *Skadeståndsrätt* pp 89 ff; Markesinis–Deakin, *Tort Law* pp 7 ff.

<sup>51</sup> See Cane *Tort Law and Economic Interests* pp 307 ff and 482 ff.

<sup>52</sup> Cf. Bishop, *Economic Loss: Economic Theory and Emerging Doctrine* (in *The Law of Tort*, Ed Furmston, London 1986) p 74; Cane, *Tort Law and Economic Interests* pp 332-3.

<sup>53</sup> Although this compilation of arguments is in no way exhaustive. See further H Andersson, *Trepartsrelationer i skadeståndsrätten* pp 31 ff.

by third parties are often easy to foresee.<sup>54</sup> It is for example not very difficult to figure out that damage to an electric cable can give rise to losses for the purchasers. After all, the theories about liability and causation are not such straightforward formulas. So if these theories cannot in general produce clear-cut solutions, we cannot either expect that such solutions will be the result of their application to three party relations.

The above-mentioned arguments cannot be united in one hierarchical scheme, nor can every argument fit to all situations. So the task for legal science is to penetrate the differences between the factual situations and focus upon convincing arguments which are being expressed in real cases (and in doctrinal discussion), thus explaining and justifying a solution in one way or the other (compensation or non-compensation). All in all – and instead of one single ultimate formula or argument – we can start working with the diverse play of differences. As a kind of theme we can examine the character of the relationship between B and C. According to the arguments referred to we can see how C's interest can become more and more "qualified",<sup>55</sup> and in some cases C's interest almost takes over even the interest of B. Hence the strategic methodological way of describing a polycentric theory is to establish how C's interest – in different ways – can be qualified and accepted within the discourse.

However, in order to do this we must proceed from the level of normative justification to the level of factual situations. Certain arguments and justifications are suited to certain situations but not to others. The deconstructive movement in reasoning is situated somewhere between these normative and factual levels and their play of differences.

### 3.4 *The Level of Factual Situations – Diversity in Circumstances*

By following the exposed diversity of layers regarding the argumentative level,<sup>56</sup> it can be observed that when a particular circumstance occurs it is often possible to find certain arguments being contemplated openly or silently by the courts. It is at least possible to understand and explain the outcome of the cases when the facts are combined with the themes associated with one – or several – of the arguments mentioned above. Therefore it can be realised that when certain facts, certain relations and other relevant factors are present, we are inclined towards one particular direction of argumentation. So we can at least point out tendencies or directions as to whether compensation will be awarded when certain circumstances are at hand. The pluralistic methodological theme is now to "unfix" the certainties of the principal rule; as mentioned this rational rule is not always put into practice – instead we can find layers of exceptions. In this

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<sup>54</sup> Cf. Hellner, *Skadeståndsrätt* p 363; Stevens, *Negligent Acts Causing Pure Financial Loss: Policy Factors at Work* p 448.

<sup>55</sup> Note that this concept is being used only as a theme, not as a rule in itself that could provide the calculation and estimation of the qualified interest.

<sup>56</sup> I.e. the process described above, 3.3.

section I will demonstrate how the solutions vary with the circumstances in cases regarding third party losses.

In order to demonstrate different tendencies concerning the chance to obtain compensation, I have made up a list of groups of factual situations, numbered from (1) to (8). The first six groups concern traditional third party losses while the final two groups concern other, more atypical three party relations, namely shock cases and prenatal injuries. The survey is based on the results achieved from a comparative study of precedents and doctrinal discourse in Scandinavia, Germany, America, England and the Commonwealth.<sup>57</sup>

In this paper, I will not comment upon more specific issues related to each group or case. I will use the cases more like well-known examples in order to make clear that the principal rule is not always upheld, and that we for different factual circumstances can detect specific normative patterns that undermine the stability of the principal rule. However, I will not elaborate on the many specific combinations of arguments (from the above-mentioned normative level) and situations from this factual level. We can observe a tendency from group (1) to (6) with a falling scale of chance for the third party to obtain compensation. And within the groups, we also can observe particular patterns of the same kind (though I do not have opportunity to comment upon that here).<sup>58</sup>

So the theme is the following: Instead of labelling all cases as the one and only familiar “third party case” we shall pay attention to the diversity of different groups of cases and apply different legal reasoning to the groups, and also within a certain group.

(1) *B sues A for damages when B has compensated C or when B has incurred costs relating to C.* B is not a third party, but if C can obtain compensation from B, and B from A, the result will be that the third party C actually gets compensation and that the tortfeasor A will have to pay for it in the end; therefore these relations can be discussed as third party cases. The tendency manifests that A often has to answer for this kind of compensation. An explanation could be that the situation is akin to the usual cases of direct damage for B with subsequent economic consequences for that person. An argument against compensation, that sometimes can win the case for A, is that B has compensated C without being legally obliged to do so.<sup>59</sup> But no sharp lines can be drawn; the discourse is open for a free play in the range between no obligation at all and an understandable commitment on behalf of B in concern for C.<sup>60</sup>

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<sup>57</sup> I have more comprehensively accounted for the cases and the debate regarding three party relations in my book, H Andersson, *Trepartsrelationer i skadeståndsrätten*.

<sup>58</sup> See e.g. my above-mentioned book for a more detailed analysis.

<sup>59</sup> Cf. *Esso Petroleum Co. Ltd v. Hall, Russell & Co. Ltd* (1989, England).

<sup>60</sup> For example there are some Scandinavian cases where B, who has incurred costs in respect of C, has been awarded compensation from A. The costs were customary in the situation but B had probably no duty to make the arrangements in question – costs for transport when B’s vehicle had been damaged by A etc. See H Andersson, *Trepartsrelationer i skadeståndsrätten* pp 97 ff.



(2) *B sues A for damages when B and C are in some sense strongly connected.* The members of a family can obtain compensation from the tortfeasor according to the legislation regarding fatal accidents.<sup>61</sup> In other family cases there are also good chances to obtain compensation when B for example has had expenses for visiting C at the hospital. The play of differences can reveal more problematic cases where B for example has quit his job in order to take care of his injured wife.<sup>62</sup> But, as above, between some boundaries at each side of the spectrum we can find many situations where the pros and cons can point in different directions, not solely towards the principal rule of non-compensation. Some problematic situations occur for example when B has taken care of the spouse without remuneration.<sup>63</sup>

Leaving the family cases, another kind of connection between B and C is when B is a person and C is his one-man company (or a small company belonging to the family). The principal rule is here distinctly upheld but, as always with these three party relations, there are sometimes, though very rare, exceptions. Such an exception is when B's injury leads to decreased profit in the company and therefore to decreased salary for B.<sup>64</sup> The problematic arguments vacillate between the fact that C is a juridical person and the fact that B has been physically injured with the result that he will have to suffer the economic consequences in the long run.

(3) *C sues A for damages when C is an insurer.* C has indemnified the assured party B. The usual cases of subrogation are unproblematic,<sup>65</sup> because B gives C the right to sue in B's place. There are other more complicated situations concerning consequences for individuals due to their insurances, but those cases will not be discussed here.<sup>66</sup>

(4) *C sues A for damages when B and C have a contractual relation and damage is being made to the subject matter of the contract.* The cases involve sale contracts in transition situations, lending, leasing etc. The tortfeasor A damages for example the property B has sold or leased to C. Within this group the chances of obtaining compensation are bigger than in the other contractual relations accounted for below under (5). Differentiation can be made depending on the degree to which C has taken over the economic interest in the property. In that way it is possible to establish a specific order of protected interests instead of merely saying that only the owner has a legal right.<sup>67</sup> For instance, when the risk for the property has passed to C or when he is the only one who has a permanent economic use of the property, it is not possible to use the floodgate

<sup>61</sup> See e.g. Clerk-Lindsell, *On Torts* pp 1470 ff; Hellner, *Skadeståndsrätt* pp 407 ff.

<sup>62</sup> Cf. *McDonnell v. Stevens* (1967, England), where compensation was denied B.

<sup>63</sup> See Markesinis-Deakin, *Tort Law* pp 710 ff.

<sup>64</sup> Cf. the Swedish case NJA 1975 s 275.

<sup>65</sup> See Cane, *Tort Law and Economic Interests* pp 435 ff.

<sup>66</sup> See H Andersson, *Trepartsrelationer i skadeståndsrätten* pp 130 ff.

<sup>67</sup> Famous examples are the liberal view expressed in *Canadian National Railway v. Norsk Pacific Steamship Co.* (1992, Canada) and the more traditional approach in *Leigh and Silavan Ltd v. Aliakmon Shipping Co. Ltd* (1986, England) where compensation was denied since C had no "possessory right".

argument against compensation. The floodgate will not open if C gets compensation; a right to third party compensation would merely trace the consequences of the physical damage to where they fall without exposing the tortfeasor to additional liability.<sup>68</sup>

(5) *C sues A for damages when B and C have a contractual relation and the physical damage deprives C of his contractual rights or expectancies.* The damage is not being made to the subject matter of the contract; instead it is made to some other property owned by B. The damage to that property has negative consequences for the contract performances. In these cases we can notice a tendency towards better chance for C to obtain compensation if it is B who is being hindered from his performance than if it is C. In the former case the physical damage lies closer to the owner of the property, and the losses could sometimes as well have been suffered by him. The most famous third party losses belong to this group, namely the cable cases as they are often referred to. Even though the principal rule still holds its position it is possible to make differentiations depending on how close interest C has in the cable.<sup>69</sup> Factors such as the following can be regarded: the number of third parties that are affected, whether C has a distinct relation to B and whether C has some more concrete influence over B or B's property.<sup>70</sup>

The chance to be awarded compensation is not very big when it is C's performance to B that has been hindered, for example in cases where the workers in a factory sue A when A has damaged their employer's plant.<sup>71</sup> The interest in B's property is more relational in such cases. On the other hand, if the whole plant or enterprise has not been damaged, but exactly the tool with which C performs his work – especially if C has some more specific personal interest in that property – the chance for compensation increases.<sup>72</sup> As these examples are indicating, it is difficult to uphold a strict principal rule when the multitude of factual circumstances is brought into the light.

(6) *C sues A for damages when C has other than contractual interest in B's property.* It is easy to notice that compensation very seldom is awarded in these cases since B and C have no contractual relation. Nevertheless, as exceptional cases, sometimes an enterprise (C) which is dependent upon the right to utilise the resources of B's real estate can obtain compensation.<sup>73</sup> The most frequent example is compensation to fishermen when the fishing waters have been polluted.<sup>74</sup> Maybe we can trace a trend, which has recently begun, towards

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<sup>68</sup> Cf. Feldthusen, *Economic Loss in the Supreme Court of Canada* p 373.

<sup>69</sup> There are numerous cases in the spectrum. Examples of compensation are *Caltex Oil Pty Ltd v. Dredge Willemstad* (1976, Australia) and the Swedish case *NJA 1966 s 210*. Examples of non-compensation are *Spartan Steel & Alloys Ltd v. Martin & Co. Ltd* (1973, England) and *NJA 1988 s 62*.

<sup>70</sup> See further H Andersson, *Trepartsrelationer i skadeståndsrätten* pp 176 ff.

<sup>71</sup> Cf. *Stevenson v. East Ohio Gas* (1946, USA) and *Hunt v. Johnston* (1977, Canada).

<sup>72</sup> Compensation was obtained in the Danish case *SHT 1952.144 SH*. No compensation in the classical *Cattle v. Stockton Waterworks* (1875, England).

<sup>73</sup> Feldthusen, *Economic Negligence* pp 259 ff; Hellner, *Skadeståndsrätt* p 367.

<sup>74</sup> Cf. *State of Louisiana v. M/V Testbank* (1985, USA).

protection of some “common interests” in environment.<sup>75</sup> Such claims might in the future become possible, though there will probably be difficulties to fix the compensation to an amount. For example, how do we estimate the value of animals that are at risk of extinction?

There are also other kinds of three party relations than the six just referred to. These cases do not always have the common features of the mentioned situations with economic loss to another person than the initial victim. However, there are some mutual patterns of legal reasoning in all cases. The first example is (7) *the nervous shock cases*, where C sues A for damages after being (in some sense) shocked due to B’s injury (or death).<sup>76</sup> And finally we have (8) *the prenatal injuries*, where C (the child) sues A for damages after being born with some injury relating to an initial act by A against B (the parent), or where B sues A for the economic burden of raising the child born with injuries.<sup>77</sup> No strict principal rule can be upheld in these cases. Numerous differentiations concerning the relation between B and C, the different economic consequences and so on must be made and allowed to have an impact on the solution.

So, as we already have seen there are compensation cases and there are non-compensation cases, and the task for legal science is to examine and explain which arguments and which circumstances that exert influence on the outcome of the cases. An open pluralistic modern – postmodern if you like – view will not be bound up to describing one perspective only. As has been briefly demonstrated above, the play of differences functions for the normative and the factual level, as well as for the various combinations of arguments and situations that can be put together from these levels.

#### 4 To be Continued – But not Being Brought to an End

This article has demonstrated that no ultimate formula – no core of Logos – can be established. Such a conclusion is not necessarily a negative result. On the contrary, it could be used for constructive attempts to create multilayered theories and methods. If we do not need the one and only Rule, neither do we have to fear the floodgate which was said to open up if we did not prevent third party claims. Awarding compensation under certain specified circumstances does not mean always awarding compensation. Neither on the level of normative justification, nor on the level of factual situations, is there a possibility to establish an unambiguous category. Thus the common idea of logical and rationalistic Reason is undermined by the uncertainties which characterise both levels. All that is left is the play of differences between the levels and between aspects of each level.

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<sup>75</sup> Cf. Feldthusen, *Economic Negligence* pp 262 ff, on the discussion of this issue.

<sup>76</sup> See e.g. Hellner, *Skadeståndsrätt* pp 396 ff; Markesinis–Deakin, *Tort Law* pp 118 ff and 204 ff; Trindade, *The Principles Governing the Recovery of Damages for Negligently Caused Nervous Shock* (CLJ 1986) pp 476 ff.

<sup>77</sup> See e.g. Clerk–Lindsell, *On Torts* pp 134 ff, 235-6 and 440 ff; Symmons, *Policy Factors in Actions for Wrongful Birth* (MLR 1987) pp 269 ff.

Accordingly, the task for legal science must be to construct an open system, which admits different legal approaches to guide different factual problems and situations. Since the legal system is always man-made we can not have as our aim to discover the natural law, the nature of law and so on. Instead we examine our legal discourse; we tell each other “stories” or “narratives” about legal problems and we find some stories which, at a given time and in a given environment, are considered to be “good” stories, to be the accepted and legitimate narrative. However, since law is always man-made it is also always open to reinterpretation. Consequently if we do not anymore believe in the strict logical and eternal system or structure that would provide us with given deductions, at least we can believe in local, provisional kinds of “systems” or “theories”. That is the free play of differences which gives us both justification and explanations so that we can predict the outcome of new situations as they appear and we thus have to confront them theoretically. With such an open system, new situations can be traced and referred to this or that area of the pattern or web, which we have analysed. If this pattern is made open to the combinations of arguments and facts, it can give both theoretical and practical guidance here and now – but not forever.

So there is no last word, just an endless story. But when being aware that we can not find an ultimate answer, we can face the multitudes and indeterminacy of the law to pick up the questions. Since we have found that there is not exclusively one answer to exclusively one question, we can put forward more and more detailed questions and associate them with more and more detailed normative responses. The worst – but not so uncommon – thing to do, would be to postulate the “true answer” and then start with the search for all the questions in relation to which we can preach our one and only answer. But the play of differences cannot be fixed within the framework of one conclusive perspective. There is no last answer, just more and more questions. We will not find an end – the end is just the beginning.