

# Sweden's No-Fault Rule for Accidents at Work – Recent Developments

**Erland Strömbäck**

## **1 Introduction**

On the Swedish labour market, the occupational safety insurance (“Trygghetsförsäkringen – TFA”) supplements the basic protection provided by the national insurance scheme. The occupational safety insurance was contracted between the labour market’s parties. Its original purpose is in essence to ensure compensation for on-the-job injuries under the norms of tort liability law, which require full compensation for loss of income and for costs arising from non-pecuniary damage and, in the case of death, compensation for loss of support and funeral costs.

An important rationale for introducing the insurance in the early 1970s was to make it unnecessary to pursue a tort liability suit for an on-the-job injury. Therefore, compensation could be granted without proof of fault (intent or negligence). This was of course highly favourable to the injured party, who could directly obtain contracted compensation without having to prove fault on the part of the employer. In return, the injured party would have to refrain from filing a damages claim against the employer.

These original components of the occupational safety insurance remained unchanged until 1993, when its terms were altered so as to require the injured party to prove fault on the part of the employer in order to receive full compensation for loss of income. Indeed, the infusion of a fault element undermined an important function of the insurance. Recently, however, the original order of things was reinstated for accidents occurring on or after May 2001. Fault need only be proven for accidents occurring prior to that time but also for occupational illnesses.

Thus, in summary, many injury cases falling within the occupational safety insurance remain subject to a proof-of-fault requirement. Whatever bearing the Tort Liability Act has had and will have on proof of fault warrants an analysis, since this is a rare phenomenon within modern Swedish tort liability law. From an international perspective, the occupational safety insurance is probably

unique. The chosen method of resolving important compensation problems in the realm of working life through an insurance that provides full tort law compensation is not without complications, as the once adopted and later abandoned fault requirement demonstrates. This type of contracted insurance has many advantages over legislated tort liability, but the contract model lacks the law's more stable foundation.

## 2 The Tort Liability Act and On-The-Job Accidents

Development of an occupational safety insurance coincided with the final preparation of the 1972 Tort Liability Act. The Tort Liability Act itself and its carefully drafted rationale were at the epicentre of the great 1972 reform of compensation rules. Pronouncements and initiatives made in conjunction with the legislative rationale also proved to be of significance. This is particularly true of the Minister's introductory, and very extensive, view of compensation issues in contemporary society.<sup>1</sup> The bill was based on reports compiled by various legislative committees but also on publications produced over several years by the Parliament, governmental authorities and organisations regarding reforms in the field of compensation law.<sup>2</sup> Also in the foreground were two demands for legislation presented by employees' representatives. A document issued in March 1968 by the National Union of Railwaymen proposed a duty for railway owners, irrespective of fault by the owner or by the railway's administration or service, to compensate personal injuries incurred by railway employees. The Swedish Transport Workers' Union raised the question of an increased tort liability for employers vis-à-vis employees. The Union requested in December 1968 a study of the question of liability irrespective of fault for employers who conduct stevedoring operations.<sup>3</sup> The gravity of the employees' demand for legislation was emphasized through personal contacts with the Minister of Justice himself.

The union demands reflected a grim reality. The then existing industrial injuries insurance scarcely provided full compensation for loss of income and costs related to work injuries. Nor did it provide any compensation for non-pecuniary damage (pain and suffering, incapacity and disability). The union representatives sought to raise on-the-job injuries to the level of tort liability law. That meant full compensation for income loss, costs and non-pecuniary damage and, in the case of death, compensation under tort liability norms for lost support and costs. An injured employee or his survivor could in principle attain this high level of compensation by merely showing that the injury was due to fault under the rules of tort liability.

Employer liability irrespective of fault (called objective liability in the bill) would radically improve the injured party's position. The level of compensation

---

<sup>1</sup> *Proposition 1972:5 med förslag till skadeståndslag m.m.*, section 1.5, p. 74 et seq. The primary authors of that section include the subsequent Supreme Court Justice Ulf K. Nordenson, who was at the time chief of legal affairs at the Ministry of Justice.

<sup>2</sup> An account appears in *Proposition 1972:5*, section 1.3, p. 60 et seq.

<sup>3</sup> *Proposition 1972:5* p. 66.

would be attained without extensive and at times complicated investigations and proceedings on the issue of fault.

On the delicate question of whether the organisations' demands should be accommodated, the Minister argued as briefly follows.<sup>4</sup> Tort liability legislation is not a self-evident solution to the need to improve prospects of compensation for injuries. Many objections that can be raised against the general rule on fault apply equally to the rules on objective liability. The ability to differentiate the private personal insurance system – both as regards the level of compensation and the distribution of costs – according to disparate needs and desires, renders the system far superior to tort liability law. The Minister stated that already existing and widely utilised group insurance schemes were of special interest. He cited the use of group insurance within a wide array of associations, especially workers' unions whose task is to promote the financial interests of their members. The unions' endeavours revealed a keen awareness of and sense of responsibility in social questions related to their members' interests.<sup>5</sup>

The Minister also found that existing group insurance schemes had arisen after negotiations between the organisations on the labour market. He thus noted that there was "reason to expect this trend to continue". He reckoned therefore that a large segment of the Swedish populace would receive greatly improved protection against many risks of injury, both inside and outside the realm of working life. The Minister thought it natural that "the organisations concerned initiate the insurance schemes I have here described". The Minister opined that legislation on objective liability was not appropriate "except where the need for improved protection within a certain area is so pressing that one cannot await the successive expansion of other compensation schemes".<sup>6</sup>

Regarding the reports of the two labour unions, the Minister stressed that the problem of compensation should be viewed in a larger context. Similar demands could be raised by other occupational categories. Objective liability for all employers was not conceivable, for reasons of principle cited in the bill. Such liability would also deviate from the line of development followed for on-the-job injuries, i.e., a transition from a system of objective liability imposed on employers to a system of insurance paid for by employers.

The Ministry of Justice concluded that the need for increased compensation should be satisfied through a continued expansion of on-the-job injury insurance and through supplementary compensation schemes in the form of collective accident insurance. The Minister found that such schemes could, with regard to criteria for calculating compensation, at least in part be adapted to that which applies within tort liability law. Employees would thereby obtain protection

---

<sup>4</sup> A description of, inter alia, the preparatory work leading to the bill and the development of occupational safety insurance appears in *Personskaderättens utveckling – ersättning på grund av individuell skadeståndsrätt eller kollektiv försäkring* ["The development of personal injury law – compensation based on individual tort liability law or collective insurance"] by Edvard Nilsson, Ulf K. Nordenson, Carl Oldertz and Erland Strömbäck, in *Vänbok till Carl Edvard Sturkell* (1996) p. 1 et seq. The article has also been printed in *Nordisk Försäkrings Tidskrift* 1996 p. 221 et seq. It will hereinafter be cited from the latter version as "Nilsson et al".

<sup>5</sup> See in particular Proposition 1972:5 p. 91 et seq.

<sup>6</sup> Proposition 1972:5 p. 100.

“largely commensurate with the protection which the rules on objective liability would provide”.<sup>7</sup>

Besides keeping demands for legislation on objective employer liability at bay, the bill improved coverage for on-the-job injuries. The Minister opined that, without there being any conflict with his previously presented basic view of compensation issues, certain tort liability reforms in this field were conceivable.

The Minister was alluding to the previously studied extension of principal liability and reduction of an employee's own liability.<sup>8</sup> The desire for these reforms was the very basis of the initiative to prepare what was to become the Tort Liability Act. Such reforms would only marginally fulfil the purposes underlying the labour unions' reports. Principal liability under Ch. 3, § 1 of the Tort Liability Act entails a continued link with the fault rule. Anyone employing persons shall compensate personal injuries and property damage which the employee causes through wrong or negligence. The reduction of the employee's own liability in Ch. 4, §1 of the Tort Liability Act entails that the employee himself is liable only if there are compelling reasons for imposing such liability, taking into account the nature of the act, the employee's position, the injured party's interest and other circumstances.

The Minister, in presenting his line of reasoning regarding on-the-job injuries, was not unmindful of reality. He would have been remarkably glib to reject the union reports by positing off-handed hypotheses on the prospect of resolving the serious problems of injury compensation through insurance. Indeed, his views contained in the bill were carefully prepared, based as they were on contacts with insurance companies and labour market parties, etc.<sup>9</sup>

Unions advocated legislation on objective employer liability, but they did not view this as the only solution. Along with employers and two insurance companies – Folksam and Skandia – the unions endeavoured to find a parallel insurance solution. These efforts were well under way when the Ministry put the finishing touches on the Tort Liability bill and its rejection of a legislatively imposed objective liability for employers.<sup>10</sup>

### 3 Occupational Safety Insurance

The first agreement on occupational safety insurance for on-the-job injuries was concluded in October 1971 between the Federation of Stevedores and the Transport Workers' Union (the so-called stevedore agreement). The backdrop was the Transport Workers' Union's letter to the Government in December 1968.<sup>11</sup> At the time of the stevedore agreement, the unions could note that the

<sup>7</sup> Proposition 1972:5 p. 103.

<sup>8</sup> Legislative report *Skadestånd II* (1964:31), see Proposition 1972:5 p. 103 and 109 et seq.

<sup>9</sup> Nilsson et al, p. 225, 233 et seq.

<sup>10</sup> The bill was referred to the Law Council for comment on 23 April 1971; the bill was adopted on 14 January 1972.

<sup>11</sup> For the history, see among others Nilsson et al, p. 232 et seq. (this section has been authored by Carl Oldertz, who is probably within the insurance realm the major engineer and promoter in the realm of the occupational safety insurance) as well as Carl Oldertz, *The Patient*,

legislature would not accommodate the demand for legislation on objective liability. That other solutions were sought is a clear sign of the gravity of the compensation issues, seen from the injured party's perspective.

The stevedore agreement was followed by several similar agreements in other occupational fields. As of 1 February 1974, there was a nation-wide agreement, covering all employees encompassed by collective agreements between the Employers' Confederation, on the one hand, and the Trade Union Confederation and the Negotiation Cartel for Salaried Employees in the Private Business Sector, on the other. Such agreements have since proliferated. Corresponding agreements have been concluded for county and provincial employees. For national civil servants, the national government has contracted essentially the same compensation. The occupational safety insurance for on-the-job injuries has thus become an integral component of the system governing on-the-job injury compensation.

The development of occupational safety insurance will be presented here only to the extent that it is directly relevant to the issue of whether proof of fault should be required to obtain full compensation for loss of income. The basic idea behind the occupational safety insurance was – briefly stated – that the employer contractually assumes full liability for on-the-job injuries, whereupon that obligation is insured, not as part of an on-the-job injury insurance but as an extension of ordinary liability insurance. In exchange, the injured party waives the right to pursue a tort liability claim against the employer.<sup>12</sup>

The first agreements on occupational safety insurance were drafted in such a manner that compensation would largely correspond to the “net” sum that would have been paid if tort liability for the employer had existed by statute.<sup>13</sup> The employer's aggregate compensation liability was limited to the injured party's actual loss. To keep costs down, however, a deviation was made from the goal of Swedish tort liability law to tailor compensation to the individual case; thus, a more standardized model of compensation was embraced. The standardized method was so devised as to provide the compensation that could probably have been expected had the Tort Liability Act been applicable.

---

*Pharmaceutical and Security Insurances, in Compensation for Personal Injury in Sweden and other Countries*, ed. Oldertz/Tidefelt (1988) p. 51 et seq. and also Carl Oldertz in *Nordisk Försäkrings Tidskrift* 1989 p. 230 et seq.

<sup>12</sup> In the first conditions it is stipulated: “An employee covered by an insurance agreement on occupational safety insurance is not entitled to pursue a claim for damages with regard to occupational injuries against his employer or other employer who has signed an insurance agreement with Labour Market Insurance Policies' occupational safety insurance or the employee of such an employer. The prohibition against filing a claim remains in the current conditions, § 35 of the occupational safety insurance terms. An interesting question is whether this clause in fact precludes damages claims against employers, e.g. in cases where tort liability law provides greater compensation than the occupational safety insurance. The clause has not yet to my knowledge been tested by a court but various aspects of the clause have been discussed, e.g., by Carl Martin Roos, *Ersättningsrätt och Ersättningssystem* [Compensation Law and Compensation Systems] (1990) p. 80 et seq. and Jan Hellner-Svante Johansson, *Skadeståndsrätt* [Tort Liability Law], 6<sup>th</sup> ed. (2000) p. 301 et seq.

<sup>13</sup> Deduction was made of compensation which could be paid by the national government, counties, insurance companies, employers or others; this constituted a more extensive coordination than the one that applies under Ch. 5, § 3 of the Tort Liability Act.

This model, along with the elimination of the Tort Liability Act's highly disadvantageous fault rule, offered great advantages to employers and employees alike. Tort liability litigation for on-the-job injuries, with its often negative publicity, were essentially a thing of the past. As in other no-fault systems, available resources could be used to provide compensation rather than to defray the costs of discovery and trial. The benefits for employees were so obvious that no further comment is required. Although the insurance model did increase premiums, a legislatively prescribed objective liability would have been even more expensive and certainly more complicated for both parties.<sup>14</sup> The insurance model also provided the parties much greater leeway to fashion the pertinent rules than would have been the case under legislation..

After introduction of the occupational safety insurance, previous demands for legislation came to a halt. The Ministry of Justice was spared a prickly problem. One might ponder what would have happened if the occupational safety insurance, with its omnibus and ingenious solution to prevailing compensation issues, had not come into being. The insurance model supplanted what otherwise could have been a law, whose contents and scope can only be the subject of conjecture. Had the Ministry of Justice been unaware of the favourable development of the occupational safety insurance, it might have initiated a study of how to accommodate union demands.<sup>15</sup> As regards ensuing insurance schemes based on the same model, i.e., Patient Insurance and Pharmaceutical Expenses Insurance, it is quite clear that the national government was spared an otherwise unavoidable legislative morass.<sup>16</sup>

The 1993 modification of the rules governing occupational safety insurance was linked with the 1991-1993 overhaul of the National Insurance and the Industrial Injuries Insurance.<sup>17</sup>

#### **4 Industrial Injuries Insurance and the Occupational Safety Insurance**

The occupational safety insurance supplements the national industrial injuries insurance scheme ("Arbetskadeförsäkringen"); a coordination rule in the terms of the former closely interlinks the two.<sup>18</sup> The industrial injuries insurance, as a

<sup>14</sup> See more on these aspects in Nilsson, et al, p. 232 et seq.

<sup>15</sup> Parliament's 1959 Damages Committee only studied the prospects of an increased principal liability, i.e., the employer's liability for the fault-based acts of its employees, see SOU 1964:31 p. 32 et seq. No study was made of objective liability for employers, and such liability would probably have been an uncommon phenomenon in Europe. Cf. Bill W. Dufwa, *Flera skadståndsskydliga* [Multiple Tortfeasors] (1993), Vol. III 5061 et seq.

<sup>16</sup> See Nilsson, et al, p. 239.

<sup>17</sup> Mainly the reduced level of compensation in the National Insurance of 1 March 1991, a 14-day sick-pay period and extension of the so-called coordination period to 180 days as of 1 January 1992, a modified on-the-job injury concept as of 1 January 1993, introduction of a one-day qualifying period and a reduced level of sickness insurance as of 1 April 1993, reduced level of compensation in the national insurance and abolition of occupational injury sickness pay as of 1 July 1993. Cf. note 21.

<sup>18</sup> Occupational safety insurance terms 1 January 1998 § 29.

component of national insurance, has its own statutory level of compensation, which usually falls far short of the level applicable under tort liability law. The occupational safety insurance provides, as a supplementary scheme, coverage on a par with the tort liability law level in cases of personal injury, i.e., 100% of the loss. As to non-pecuniary damage (pain and suffering, incapacity, disability and other hardships) the occupational safety insurance is the sole source of compensation.

The occupational safety insurance's hallmark principles, objective employer liability under contract and victim compensation levels under tort liability law, have been the subject of dispute in recent years. One bone of contention is the scope of coverage: Does the insurance fill in the gaps when "underlying" benefits, particularly national insurance, are cut back? That is clearly one of the functions of compensation under tort liability law. Under Ch. 5, § 3 of the Tort Liability Act, changes in coordination benefits affect the net amount paid in damages.<sup>19</sup> If a coordination benefit is reduced, e.g., after a governmental decision to reduce national insurance benefits, tort liability compensation will be correspondingly higher so as to ensure the injured party 100% compensation for his loss.<sup>20</sup>

It has been questioned whether the same synergy applies to occupational safety insurance especially in connection with curtailments of industrial injuries insurance. This problem has recently become closely linked with the proof of fault issue, which warrants separate comment.

In 1993, all on-the-job injuries were made subject to the following: The requirement of proof of the harmfulness of an environmental factor was raised from "probable" to "highly probable" and causation would be deemed to exist between the on-the-job injury (accident or occupational illness) and the harmful on-the-job factor if weighty reasons so dictated.<sup>21</sup> In the transitional provisions accompanying the new rules, it was furthermore prescribed that the new, stricter rule of evidence was also to be applied to injuries occurring before 1993 but which had not been reported to the social insurance office until 1 July 1993.

Another curtailment was made to apply as of 1 July 1993, namely, the termination of the right to occupational injury sickness pay.<sup>22</sup> On-the-job injuries thereby lost the privileged position they once enjoyed during the period of illness and were henceforth to be dealt with as any other case of illness. The privileged position for on-the-job injuries was however retained in cases where the employee is diagnosed to have suffered a lasting reduction of his/her

---

<sup>19</sup> See concerning the net calculation method and coordination, inter alia, Proposition 1975:12 p. 125 et seq., 162.

<sup>20</sup> The circumstances prevailing at the time when compensation is to be decided is according to the wording of Ch. 5, § 3 of the Tort Liability Act decisive. See Proposition 1975:12 p. 162.

<sup>21</sup> The modification was mainly occasioned by a great increase in the 1980s of the number of approved cases of occupational illness, see SOU 1992:39 and Proposition 1992/93:30. In practice, this curtailment resulted in e.g., musculo-skeletal injuries largely falling outside the insurance's protection.

<sup>22</sup> This measure was only in part due to budgetary considerations; there was also the view that high compensation during the period of illness could indirectly counteract rehabilitation of the injured party, see SOU 1998:37 p. 171 et seq.

working capacity.<sup>23</sup> The life annuity, available under the industrial injuries insurance scheme and which has compensated lasting reductions of working capacity, would continue to ensure full compensation for loss of income, up to 7.5 base amounts. Receipt of a life annuity presupposes however that working capacity has declined by at least one-fifth.

One outcome of the 1993 amendments was that national insurance coverage for loss of income dropped from 100% to 70-80% (a reduction of the national sickness benefit to these levels was adopted on 1 April 1993). Moreover, many cases, especially those involving occupational illness, were excluded from the industrial injuries insurance scheme. The amendment also applied to injury cases occurring before 1 July 1993.

The cutbacks in national insurance raised the question of to what extent, if any, the occupational safety insurance were affected. The employers claimed – briefly stated – that the occupational safety insurance would not offset reductions in the industrial injuries insurance. Labour, for its part, interpreted the rules governing occupational safety insurance in the opposite manner; the injured party was thus to be compensated for the cutback.<sup>24</sup>

The Employers' Confederation instituted arbitration proceedings, claiming that the occupational safety insurance would not provide compensation corresponding to the compensation which was no longer available from a) the industrial injuries insurance on account of the new concept of on-the-job injury which applied as of 1 January 1993; b) the national insurance on account of the reduction of the national sickness benefit; and c) the industrial injuries insurance on account of the abolition of the occupational injury sickness pay. Two union parties – Trade Union Confederation and the Negotiation Cartel for Salaried Employees in the Private Business Sector – requested dismissal of the Employers' Confederation's claim.

In the ensuing arbitration judgment of 8 September 1993, the arbitration panel rejected the Employers' Confederation's claim. The panel concluded after extensive argumentation that it had reason to assume that the occupational safety insurance had through the years been applied in conformity with the principles underlying Ch. 5, § 3 of the Tort Liability Act and that this practice was known to the contracting parties. The decision was well in line with the purpose of the insurance to provide tort liability law compensation.<sup>25</sup>

One consequence of the arbitration judgment is that the party who suffers an on-the-job injury before 1 January 1993 is entitled to have the injury assessed under the occupational safety insurance's coordination rules as interpreted by the

---

<sup>23</sup> Proposition 1992/93:178 p. 43.

<sup>24</sup> The question took on great dimensions. In fact, a group of actuaries from the insurance companies concluded that the sum that could fall to the occupational safety insurance if the employees' view was correct could be as much as 16 billion Swedish kronor in the ensuing years. Cf. note 26.

<sup>25</sup> Among employers the view still exists that it was not possible to predict at the time when the occupational safety insurance was introduced that underlying benefits could be lost. The arbitration judgment militates against locking the insurance to the circumstances as regards coordination at the time of the insurance scheme's introduction. If objective liability had instead been stipulated in legislation, Ch. 5, § 3 of the Tort Liability Act would naturally have been applied.



arbitration panel, irrespective of when the injury was reported to the social insurance office. Furthermore, a person who suffered an on-the-job injury before 1 July 1993 is entitled to full compensation for loss of income under the occupational safety insurance, notwithstanding the reductions of the compensation levels in the industrial injuries insurance.

The arbitration decision places a certain burden on the occupational safety insurance, though nowhere near the billions of kronor that the insurance companies' actuaries had predicted.<sup>26</sup> The insurance was adapted in 1994 to the new on-the-job injury concept, effective as per 1 July 1993.

The parties to the occupational safety insurance agreement did not thus consider that they could afford to retain their obligations and thereby offset curtailments of national insurance. They even felt compelled to embrace the fault rule to curtail the possibilities for injured parties to obtain full compensation for loss of income and expenses.

## 5 The Fault Rule's Background and Scope

The fault rule can be summarized as follows: If the injured party can demonstrate that an on-the-job injury has occurred within the framework of employment and is due to the negligence of an employer who has contracted an occupational safety insurance and that such negligence falls within the meaning of the Tort Liability Act, then the injured party is entitled to compensation for loss of income under that Act. The same applies if a co-employee has caused injury through wrong or negligence. Entitlement to compensation is decided by a special board. A dispute as to whether compensation shall be decided under the Tort Liability Act is decided by a court of general jurisdiction. Any claim for compensation lodged under the Tort Liability Act is filed against the Labour Market Insurance Company's occupational safety insurance division (§ 22 of the terms).<sup>27</sup>

The fault rule undercut a decades-old system of insurance established for the protection of employees. An important premise of the insurance – that the injured party should not need to demonstrate fault in any respect – suffered a substantial setback.

What was the reason for this deviation from past principles? A contracted insurance reflects what the parties have agreed, perhaps after some compromising. The original agreement was very simple: Employers assumed an obligation to pay damages in the case of on-the-job injuries, and employees

---

<sup>26</sup> Cf. note 24. Until the end of 1999, paid compensation sums reached 966 million Swedish kronor and payments during 1999 reached 75 million kronor, *AMF-trygghetsförsäkrings årsredovisning 1999* [National Labour Market Board's occupational safety insurance's annual report 1999], p. 72.

<sup>27</sup> The fault provision is supplemented in § 35 with the provision that an employee may not, on account of personal injury which constitutes an on-the-job injury, file a tort liability claim against a legal person who has signed an insurance agreement governing occupational safety insurance. Nor may an employee file such a tort liability claim against an employer, employee or other party covered by occupational safety insurance. Cf. note 12.

waived the right to a tort liability action. As a consequence, the legislature was spared the need to issue legislation demanded by labour.

Employers clearly wished to prevent extremely high costs for the occupational safety insurance. They were greatly shaken by the arbitration decision and its interpretation that the occupational safety insurance should assume a large share of the compensation liability once shouldered by the industrial injuries insurance.<sup>28</sup> Another thought was that the limitations on national insurance benefits should also penetrate the realm of occupational safety insurance.

But another pertinent question is: Did the insured employees capitulate? Did the employees' representatives fail to uphold the insurance scheme's original purpose?

An analysis of these questions requires one to take a broad view of the occupational safety insurance's compensation for loss of income. The truth is that such compensation was of minor significance at the time when the industrial injuries insurance in principle compensated loss of income by up to 100% during the period of illness, i.e., the scheme that applied mainly until abolition of occupational injury sickness pay in 1993.<sup>29</sup> As concerns compensation for lasting incapacity to work, the 100% level still applies, up to 7.5 base amounts, which thus leaves rather little room for the occupational safety insurance.

Another component of the analysis comprises certain provisions in the insurance terms introduced at the same time as the fault rule (§§ 6 and 13). They entailed in essence standardized compensation for loss of income and were intended to compensate the injured party for 10 or 20 percent of the loss of income during the illness period, depending on whether the loss amounts to 20 or 30 percent of income. The altered terms also sought to compensate, during a lasting incapacity to work, loss of income constituting less than 1/15 of income under 7.5 base amounts and loss of income above the base amount limit (i.e., the portions of the loss not compensated by an on-the-job injury life annuity). These compensation items "float above" national insurance benefits, without being coordinated with them according to the pre-1993 model (Ch. 5, § 3 of the Tort Liability Act).<sup>30</sup>

The altered terms thus entailed that an injured party could only receive supplementary compensation for loss of income upon proof of fault. He was also subject to a deductible of 500 kronor from the compensation for costs.

---

<sup>28</sup> The Swedish Employers' Confederation considered that the arbitration decision entailed a dramatic alteration of the premises of the occupational safety insurance. The lesson appeared to be that costs in the multi-billions could arise for that insurance scheme if the national government were to reduce coverage under the industrial injuries insurance.

<sup>29</sup> Even after abolition of the occupational injury sickness pay, a worker can in most cases expect an increased compensation level on account of a right to sick pay, benefits from contracted group health insurance and the like.

<sup>30</sup> If the industrial injuries insurance is further curtailed, the scope of the occupational safety insurance is not, as previously, automatically expanded. Instead, the significance of possible compensation increases if fault is proven, i.e., decided under tort liability rules. This is probably the most important barrier against an unforeseen extension of the occupational safety insurance.

The 1993 changes in the terms of insurance were fully consistent with the increased restrictivity of the national insurance and sought, according to the employers, to prevent costs from being retroactively passed on to the occupational safety insurance, mainly from the industrial injuries insurance.<sup>31</sup> The fault requirement was also seen to promote better awareness of accidents and their causes – with greater protection through precautionary measures as a bonus.

Labour was not as favourably disposed. It opined that the fault requirement was disdained by employees but also by many employers. The studies conducted on the fault question were liable to create antagonism between employers and employees. Even among employers, there was a preference for returning to the previous order of things, especially since the cost was surely negligible. If employers laud the requirement of fault because it helps uncover deficiencies in safety, one might question the efficacy of a system based on accidents that have already occurred. The fault rule was unpopular, and labour's position was that the rule should be abolished. In the year 2000, the Trade Union Confederation's congress resolved that the Confederation should strive for abolition.<sup>32</sup>

## 6 The Fault Rule in Practice

The board, which under § 22a of the contract terms is to decide the question of fault, is to pronounce itself on whether liability exists under the fault rule of the Tort Liability Act; this difficult task is to be performed in a large number of cases in written and summary proceedings. The board is not a court: Its decisions are of an advisory nature.

The board consists of three members of high legal competence: one chief judge of a district court and two court of appeals judges. Three lawyers serve as presenters of the cases and as board secretaries.<sup>33</sup> The injured party bears the

---

<sup>31</sup> Swedish Employers' Confederation's circular letter 1994:16.

<sup>32</sup> See e.g., Palle Carlsson in *Fackjournalen* 5-97 p. 5-97 and 2-98 p. 5, Leif Jansson in *LO-tidningen* nr 12/1998 p. 6. Several motions made at the Trade Union Confederation's congress (Ie5, Ie7, Ie8, Ie16, Ie18, Ie21, Ie23, Ie25, Ie26, Ie28, Ie29, Ie30, Ie31, Ie32, Ie34, Ie35) requested abolition of the fault rule. At the recommendation of the Confederation's board of directors in its opinion papers (*Motioner och utlåtanden Del 2* p. 614 et seq.), the congress resolved that the Confederation should forcefully seek the immediate abolition of the proof of fault assessment.

<sup>33</sup> According to one of the members, chief district court judge Jan Vilgeus, each member decides the cases which he has been assigned. Cases constituting a reconsideration are however determined by two members in case there will still be a loss of the case. The members read each other's decisions and convene on a regular basis to discuss case law. It has not been deemed necessary for the board's case law to be compiled. The case assessment is made on the basis of statements made by the injured party on a special form for that purpose. It is very common that the employer agrees with those statements. Photographs and other materials are sometimes appended. – Concerning the board's work, see articles by Madeleine Randquist in *Fackjournalen* no. 4-95 p. 30 et seq., 5-95 p. 24 et seq., 1-96 p. 56 et seq., 2-96 p. 35 et seq., 3-96 p. 50 et seq., 4-96 p. 42 et seq., as well as in *Fackjournalen's* successor publication *Alla*: (as yet unpublished). Madeleine Randquist has also abstracted illustrative and interesting cases from the board's case law in *Alla*: 1-00 sections X-XI, 2-00

burden of proving an employer's or fellow employee's fault.<sup>34</sup> The injured party must present all of the circumstances relevant to the accident as well as, for example, reports issued by the police and the Labour Inspectorate, information on weather conditions in the case of accidents outdoors, etc. The board is, it would seem, cognizant of the problem of producing evidence. The board determines whether an employer – or someone for whose acts the employer answers legally – is at fault for the damage, based on evidence presented on the cause of the injury. The determination is guided by the Tort Liability Act's fault rule, even if the activities in question fall under strict liability (cf. below). Given the dearth of judicial case law in recent years concerning on-the-job injuries, the board has to fashion its own case law.<sup>35</sup>

Sometimes the board pronounces that the evidence does not suffice. The board then explains in what respects the evidence is deficient. It can be noted that the board very rarely considers a fellow employee to be at fault. In other words, fellow employees are usually found non-labile.

If the evidence is incomplete, the board will not undertake to fill the gaps. Nor will the insurance company do so. As in judicial cases amenable to out-of-court settlement, the party bearing the burden of proof, i.e., the injured party, is himself obliged to fill gaps in his evidence. Once the injured party produces the missing evidence, he may request that the board reconsider the claim.

In any case, the parties consider that the high competence and experience among the insurance company's staff contributes to a satisfactory basis for the assessment. Labour considers however that this staff should be given greater authority.<sup>36</sup> The board, for its part, considers that the fault investigations have improved in recent years; that view is to some extent borne out by the number of favourable judgments appearing in the statistics (see below). At present, for example, employers are more inclined to submit their own investigation reports; this helps to clarify the course of events leading to an accident.<sup>37</sup> Information regarding the board's work and its proof requirements have gradually improved over time.

According to employees' legal representatives, it is not always easy to involve employers in the investigations of an accident. Those representing

---

section X-XI, 3-00 section XI-XII, 1-01 section X-XI.

<sup>34</sup> According to an agreement between the parties, a case can, if there exist compelling reasons, be determined under a different procedure, i.e., without the fault board being seised. Instead, the parties agree that compensation shall be paid in especially complex and distressing cases. Example: In connection with a life boat exercise, the boat loosened from its hooks and plummeted into the water. Two persons were seriously injured. It was not possible to ascertain the reason for the accident. The injured parties were granted full compensation.

<sup>35</sup> A detailed analysis of the board's case law is presently being made by Mia Christina Carlsson in a doctoral dissertation study at the Stockholm University Faculty of Law.

<sup>36</sup> The parties' view of these and other issues has been presented to the author by Alf Eckerhall, Swedish Employers' Confederation, and Palle Carlsson, Swedish Trade Union Confederation, and Lennart Stéen, Swedish Trade Union Confederation-Confederation of Professional Employees Rättsskydd AB. Concerning the investigations conducted in on-the-job injuries cases, extensive information is presented in, e.g., *Skadehandboken* [the Tort Liability Book], published by the Trade Union Confederation (1999).

<sup>37</sup> Madeleine Randquist, article in *Alla*: (as yet unpublished). Cf. note 33.

employees' interests think that one reason for this is that the employer might believe he will himself have to pay or that he will become the object of investigation by the police and prosecutor. Conflicts can naturally arise between the injured employee, on the one hand, and a supervisor or fellow employee, on the other, if one of the latter has to be designated as negligent.<sup>38</sup> Since the board began its work in 1995, it has reviewed about 6,000 cases, about 500 of which were reheard. In 1996, 53% of the cases resulted in an award; 47 percent were denied recovery. In 2000, the corresponding figures were 55% and 45% respectively. The cases in balance constituted at the inception of 1999 just over 1,000, at the end of 2000 only just over half, or 559. Occupational illnesses constitute a minor portion of the cases decided. At the end of 2000, the board had decided in favour of 46 such cases and denied recovery in 39.<sup>39</sup>

A sampling of the board's opinions reveals that they concisely describe the relevant facts and usually contain a careful and easily accessible rationale for the board's conclusion on the issue of liability. This style of drafting decisions closely resembles the method of presenting a court's rationale in a civil court judgment, albeit in a more concise manner.

The board is required, with a reasonable degree of probability, to arrive at how the accident occurred or the factors which have constituted an illness. Sometimes, relevant information is lacking and the board is thus unable to find tort law liability. Other protective provisions, especially those of the Working Environment Act, are considered. The board also examines photographs, diagrams and other visual materials. Sometimes, technical details decide the outcome. A common reason for denying recovery is that the accident was not so likely and foreseeable that the employer can be held liable for it. On the other hand, previous accidents and incidents in the same work place can lead the board to find that the employer was at fault. Today's stringent requirements applicable to the working environment often make it easy for the board to find fault. Not seldom, however, the board concludes that a sheer accident has occurred.<sup>40</sup>

When the board decides the issue of fault in connection with occupational illness, the case could involve, e.g., ailments caused by solvents, vibration injuries from hand-held machines, asthma due to exposure to cutting fluids or allergic eczema. The board may be faced with difficult problems of proof, but the injury's or ailment's mere existence might itself be sufficient proof if

---

<sup>38</sup> The word fault is (according to employee representatives) viewed by many employers with repulsion.

<sup>39</sup> Charlotte Gredborn-Öhman, *Labour Market Insurance Company occupational safety insurance*.

<sup>40</sup> The board fulfills a certain function in the formation of case law within tort liability law through the rich material that passes the board and is assessed by it. The board does not however compile its case law, cf. note 33. It is on the other hand assumed that the board's assessment of various typical situations comes in any case to the knowledge of those interested. In the long term, however, the board must, not least for its own use, compile its case law in some form. Otherwise, its important decisions will to some extent have a mere ad hoc character. The relationship to other case law formation in tort liability law is still unclear. If the question of tort liability arises for on-the-job injuries before the courts, the board's assessments can of course have a certain influence, especially considering the board's extensive experience and increasing competence in assessing on-the-job accidents.

shortcomings in protection are attributable to the employer. The injured party and the employer might have different views about the adequacy of protective arrangements; this can make the issue of fault more difficult and it might therefore be necessary to base the fault assessment on other factors.

The board shall, as stated above, base its assessment on the Tort Liability Act's fault rule (Ch. 2, § 1) and naturally on the special liability provision for the fault of third parties under Ch.3, § 1 of the same Act (employer liability). The question thus arises how the board handles the issue of liability *irrespective* of fault. Such no-fault liability applies to employers under various tort liability laws, e.g., the Electricity Act (1997:857), the Railway Transport Act (1985:192), the Products Liability Act (1992:18) and Ch. 32 of the Environmental Code (1998:808).<sup>41</sup> Each of these laws allows the injured party to recover without proof of fault.

Even when assessing a case under one of these special favour-the-victim laws, the board applies the fault rule of the Tort Liability Act. Example: While involved in assembly work in a switchyard, an employee is stricken by electrical current in his shoulder and shoulder area, resulting in burn injuries. The board found the employer to be at fault – the employer had neglected to take protective measures. The board noted however in its opinion that strict liability applies to activities associated with this type of electricity.<sup>42</sup> The same situation, assessed under the Electricity Act, would have made the employer liable for the accident irrespective of anyone's negligent fault.

Such peculiar decisions reveal a foundational flaw in the system. The board's mandate is only to assess whether or not fault exists in various injury situations. The board therefore compels itself, mainly for formal reasons, to consider the question of whether someone has been negligent and therefore caused the accident. The injured party's only solace is that the board has had one eye on the strict liability which does in fact apply to the injury situation at hand, and therefore perhaps more easily concludes fault. The threshold for concluding fault is thus lower than would otherwise be the case.

In such cases, however, the injured party is deprived of the protection which strict liability laws has intended for him. The insurance agreement's prohibition against filing suit precludes him from suing the employer on the basis of strict liability. And the employer's ordinary liability insurance normally exempts on-the-job injuries, clearly applying to cases of fault and strict liability. Now hardly anyone believes that a court would, based on the prohibition against suit, dismiss a tort suit on account of rules on liability irrespective of fault. The problem reveals however the many anomalies precipitated by the hasty introduction of the fault rule. An injured party who has lost its case before the board can either request a re-hearing or sue the insurance company in court. One would expect labour's discontent with the fault assessment to have sparked multiple court

---

<sup>41</sup> If the on-the-job injury is to be assessed under the Traffic Accidents Act (1975: 1410), then the industrial injuries insurance does not apply. – The Working Environment Act (1977:1160) imposes such a severe liability on the employer for risks of injury at the place of work that the Act comes very close to imposing strict liability. This is a common opinion on the part of employee interests, as can probably be corroborated by many lawyers.

<sup>42</sup> The case is described by Madeleine Randquist in *Alla*: no. 621:00.

challenges against the insurance. This has not however been the case. Only one trial has taken place, which has not however resulted in an unequivocal judgment of interest. This can of course be seen as a sign that the system is functioning to everyone's satisfaction.<sup>43</sup>

## 7 Concluding remarks

Through its fault provision, the occupational safety insurance represents a step backwards. Simplicity, once the hallmark of this insurance scheme and its major advantage over traditional tort liability law, suffers in part from many of the very same complications sought to be avoided under the original, strict tort liability model. Based on the points of departure stated in legislative bill 1972:5, the compensation system for on-the-job injuries saw its wings clipped. The legislature's envisagement of the solution of a vital compensation issue suffered a defeat on an important point of principle. Although conditions have changed a lot since the Minister drafted his theses, this can only partially explain what has happened. The main purpose of the amendments was to save money, and yet other solutions to that end could have been chosen without sacrificing the interests of injured parties.

Employers saw fault assessment as a bulwark against unpredictable and burdensome cost increases, which they thought would otherwise result given the national government's signals that increased restrictivity awaited health compensation systems. Employers thought the Swedish system of compensation for on-the-job injuries was still very generous and perhaps unique from an international perspective, not least considering the compensation available for non-pecuniary damage, covered in full by occupational safety insurance.

Labour, for its part, acquired an even more complicated right of compensation, which put the injured party in an even more difficult situation than previously. For injured parties as a group but also as individuals, the fault assessment regime has proven to be a glitch in a previously well-functioning machinery.

The previously so simple and advantageous model may have been lost in the give-and-take of negotiations. But it is one thing to agree to a fault requirement at the negotiating table – applying that requirement is quite another matter. Granted, the parties' choice of a board procedure did offer a smoother and simpler procedure than could be offered by e.g., a court procedure. But the chosen solution presupposes that the board has a good overview and decision-making power. Since the introduction of the occupational safety insurance in the 1970s, the courts' development of case law has largely lain fallow.<sup>44</sup>

The fault board must thus develop new case law for many of the situations typifying modern working life. Legislation on the working environment, e.g., with its categorical demand for a safe working environment, provides added

---

<sup>43</sup> That the case statistics year after year reveal an essentially 50/50 relationship between won and lost cases also gives cause for pause.

<sup>44</sup> Cf. Jan Hellner-Svante Johansson, *Skadeståndsrätt* [Tort Liability Law], 6th ed. (2000), p. 301.

room for use of the fault rule – just how much it adds is in the hands of the board.

One gets the impression that the fault board lives up to the high demands to which it is subject and is highly adroit in handling the multitude of delicate and complex fault issues put before it.

The above is also confirmed by representatives of the injured parties. The board's liberal view of the proof requirement renders the drawbacks of a board assessment, compared with a court proceeding, less palpable. One might justifiably lament that the board's working methods and its assessment of proof fail to ensure a sufficiently sound basis for its judgments.<sup>45</sup> This can naturally entail consequences for either party: Tort claims are rejected and non-tort claims are granted.

The parties themselves have however chosen the mode for assessing fault. Boards boast a strong and favourable tradition in Sweden.<sup>46</sup> That a court has been utilized in only one case of the thousands decided by the board can certainly be seen by employers and labour as a sign that the board has succeeded well in its difficult task, not least considering the summary nature of the procedure.

And yet one may still question the whole idea of a system that makes full compensation subject to proof of fault. The proof-of-fault requirement has turned out to complicate, without sufficient justification, the position of injured parties. There is often a fine line between fault and no-fault cases. It may be by mere chance that one discovers or does not discover a circumstance deemed to constitute fault. Considering the stringency of working environment laws, there presumably exists a latent employer fault in the vast majority of on-the-job injury cases.

In this regard, injured parties are greatly disfavoured by the fault provision. That provision puts the injured party in a precarious position, since he alone must demonstrate all the circumstances that can convince the board that the employer was at fault. Thus, besides the hardship of the injury itself, he is required to take measures to secure sufficient proof and, without compensation for the expense of legal representation, master the written procedure before the insurance company and the board.

The rules that have been stipulated for the procedure itself thus reveal an inadequate understanding of the injured party's often precarious position.

As to the economic risk of abandoning the fault requirement, it can be noted that the cases of on-the-job injury are, mainly due to the restrictions introduced in 1993 for the industrial injuries insurance, relatively few at present and mainly limited to accident cases.<sup>47</sup> Occupational safety insurance is now subject to the

---

<sup>45</sup> For this it would be required, e.g., that the board can orally question the complainant and witnesses. Experience shows that a task as subtle as the assessment of fault or non-fault is often highly dependent on oral proof.

<sup>46</sup> Cf. Section *Rättsbildning genom domstolar eller nämnder?* [Legal Development through courts or boards?] in SOU 1995:33, p. 413 et seq.

<sup>47</sup> In 1992, the social insurance offices approved 67,000 on-the-job injury cases, during later years much less. Cf. SOU 1998:37 *Den framtida arbetsskadeförsäkringen* [The future industrial injuries insurance], p. 105 et seq. The Government has now indicated its wish to



same injury concept as industrial injuries insurance, which means that the 1993 restrictions have already stricken insured parties as a group. The cost of reinstating the right to full compensation without proof of fault would certainly not be a heavy cost for the occupational safety insurance. What is more, the employees have themselves financed the insurance by refraining from the corresponding amount in salary.<sup>48</sup>

The abolished fault requirement concerning most injuries covered by occupational safety insurance would favour the injured parties who now receive full compensation under tort liability norms. They can again enjoy the high degree of rationality, freedom from complication and generosity which previously characterized this insurance.

But there remain many injured and sick who must still fulfil the fault requirement and thereby withstand an unfavourable situation; these persons have been unable to prove fault before the board or perhaps have even refrained from lodging a claim out of sheer lack of knowledge or resignation in the face of the proof requirement.

The experiences from the previously applicable and to some extent still applicable fault assessment rule in the occupational safety insurance should in the future cause the parties not to deviate from the original idea of insurance liability irrespective of fault. History will view the fault rule as a mistake, which has caused unjustified suffering for a whole generation of injured parties.

---

strengthen the industrial injuries insurance and, inter alia, lighten the requirements of proof (April 2001). The lessening of the proof requirement is probably of the greatest significance in the case of occupational illness, where the occupational safety insurance has retained the fault requirement.

<sup>48</sup> The insurance does not as a practical matter require any premiums at present. Revenues from premiums for 1999 were 98 million kronor, payment of insurance compensation was 877 million kronor and the market value of the capital was 36,448 million kronor (AMF *Försäkring* [National Labour Market Board's occupational safety insurance's] *annual report 1999*).