Modern Tort Law and Direct Claims Under the Scandinavian Insurance Acts

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1 Modern Tort Law

In Scandinavia, as in other parts of the world, classical tort law was developed during the 19th century and influenced by the liberalistic ideology of that time. Consequently, the general rule of negligence came to be known as a fundamental principle under classical tort law. The rule implies that the central liability criterion is fault. The concept of fault is subjective. The focus is primarily on the psychological state of mind of the tortfeasor when deciding whether the damage could have been and ought to have been prevented. However, already under classical tort law, this subjective vantage point is in part modified by the general view that the individuality of the tortfeasor is irrelevant when deciding whether he has acted negligently. Thus, personal disabilities do not influence the negligence standard.[1] The less intelligent tortfeasor is treated just like everyone else and judged by the same bonus pater standard. Under modern tort law, the subjective content of the negligence rule has been modified even more. In fact, it has been more or less replaced by an objective approach.[2] The focus is no longer primarily on the psychological state of mind of the tortfeasor. Instead it is evaluated whether the tortfeasor's way of acting, viewed with the eyes of a bystander, can be considered correct behaviour. In this respect, rules of conduct as laid down in official provisions play an important role.[3] In particular, this is relevant when dealing with the liablility of professionals. The constructor must build in a workmanlike manner respecting the rules in the offical building code. The accountant must live up to the requirements of the special rules regulating his activities, etc.

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1 See Lassen, *Almindelig del*, 3. ed., 1917-20, p. 270, note 8. Cf. Hagerup, *Strafferettens almindelige del*, 1911, p. 500.

2 Von Eyben and Vagner, *Lærebog i Erstatningsret*, 4. ed., 1999, pp. 57-58.

3 Stig Jørgensen, *Erstatningsret*, 1966, p. 67, Von Eyben and Vagner, *Lærebog i Erstatningsret*, 4. ed., 1999, p. 57 ff.

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The shift from a subjective to a more objective approach to liability questions is also reflected in a growing tendency to focus on the question of risk rather than the question of fault. In Danish law, this change in approach was already described in the Monography "Risk and Fault" (Risiko og Skyld) by Trolle from 1960. Trolle points to the fact that the fault rule is not devised to deal with liability issues connected with the many risk involving activities that take place in modern industrialised society. Moreover, considerations as to risk are often weighty arguments cited to support the introduction of rules establishing strict liability in tort. An obvious example is the rules on product liability. In Denmark strict liability rules have been established primarily by way of legislation but in Norway and Sweden also by way of judge-made law.[4] In fact, the special rules establishing strict liability are so numerous and cover such vast areas of the law, that describing the negligence rule as the general rule hardly conveys an adequate picture of modern tort law.[5]

The shift from a subjective to an objective approach is also reflected in other tort law concepts. The concept of foreseeability (adækvans) was originally closely linked to the subjective negligence standard.[6] The tortfeasor was liable only in so far as he had been able to foresee the consequenses of his act. Tortious liabililty was seen as a consequence of the act of the tortfeasor. As explained above, this view can hardly stand alone under modern tort law and naturally, therefore, also the concept of foreseeability has undergone changes.

Flemming puts it this way:

> "Liability for negligence, in particular, has been traditionally geared to the individualistic concept of fault, and the limitations on legal responsability inevitably reflect a policy of keeping a rough correlation between what made the defendant's conduct culpable and the consequences he shall be answerable for. Yet, as insurance and loss distribution are attaining greater prominence in the allocation of risk, the fault criterion is bound to diminish in appeal not only on the question of when to attach liability, but also for how much".[7]

Thus, in modern Scandinavian theory the concept of foreseeability is often replaced by the criterion of "typical damage".[8] This criterion is not linked to the psychological state of mind of the tortfeasor. In principle it must be evaluated by means of party external, objective criteria, whether or not the occured damage can be regarded typical.[9]

The shift from a subjective to a more objective negligence standard and the growing tendency to impose strict liability in certain areas of the law also

4 Ulfbeck, *Kontrakters relativitet*, 2000, p. 81.

5 See Lødrup, *Erstatning, kollektive forsikringsløsninger eller andre særordninger*, LoR 1990, p. 572.

6 Stang, *Erstatningsansvar*, 1919, p. 137, Håkan Andersson, *Skyddsändemål och adekvans*, 1993, p. 289.

7 Flemming, *The Law of Torts*, 1992, p. 203.

8 Von Eyben and Vagner, *Lærebog i Erstatningsret*, 4. ed., 1999, p. 279, Bengtsson, SvJT 1994, p. 198.

9 The difficulties in applying this criterion are described by Bonnevie, *Adekvanslæren og beslektede retsfelter*, 1942, p. 86. See also Ulfbeck, *Kontrakters relativitet*, 2000, p. 83 ff.

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impacts on the way we solve other fundamental tort law problems. Under classical tort law the main rule is deemed to be that only the person who is directly affected by the tortious act (umiddelbart skadelidt) is entitled to damages. Third parties that merely suffer loss as an indirect consequence of the act cannot recover. Danish law has sought to justify this rule by reference to the doctrine of unlawfulness (retstridighedslæren). Only the person to whom the wrong has been done should be allowed to sue. To let third parties sue would – in the words of Cardozo – imply letting them build on a wrong to someone else.[10] This rule, too, is based on the assumption that liability is imposed as a legal reaction to individual fault. It is therefore not surprising that also this principle has come under attack as the fault criterion has come to play a less dominant role. Alternative criteria have been developed. For instance, in relation to cable cases certain third parties with "specific and closely connected interests" have been allowed to recover.[11]

A closely related tort law problem is the question of recovery for purely economic loss.[12] On this question Scandinavian law is divided. Under Swedish law it is the vantage point that there should be no recovery in these cases. In contrast, under Norwegian and Danish law economic loss in principle is recoverable like any other damage. However, also in these legal systems it is generally recognized that it may be "harder" to recover in a purely economic loss case than in a psysical loss case.[13] This view in part has to do with the problems attached to the application of the doctrine of unlawfulness to purely economic loss cases.[14] However, as the fault based liability rule in general plays a less dominating role today, the problems of applying the unlawfulness criterion are equally reduced. Seen in this light it seems doubtful whether a general rule of no recovery for purely economic loss can be upheld in a modern knowledge-based society where economic loss cases presumably will come to play a still more important role.[15]

The above described development draws up a picture of an expanding tort law affording still broader protection of the injured party. The expansion is expressed in the move away from the classical subjective negligence standard as the overall dominating liability rule and in the consequential fall or modification of traditional concepts designed to limit liability. This extension of liability has been possible only because of the role played by insurance. Thus, often the burden of strict liability to the individual tortfeasor is reduced by means of liability insurance. Under Danish law this is reflected in section 24 in the Liability Act stating that it is legitimate for the court to take into consideration

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10 (1943) A.C.92, p. 108.

11 Hellner, *Ersättning till tredje man vid sak- och personskada*, SvJt 1969, p. 356-357.

12 Hereby is meant loss caused by psysical damage done to someone else or economic loss which has no connection with psysical damage at all.

13 Von Eyben and Vagner, *Lærebog i Erstatningsret*, 4. ed., 1999, p. 214.

14 Ussing pointed to the absence of a common rule of moral in these cases, see Ussing, *Retstridighed*, p. 49.

15 See Kleineman, *Ren formögenhetsskada*, 1987, p. 367, Dufwa, *Skyddat intresse, ren förmögenhetsskada och andra skadeståndsrättsliga spörsmål i ett internationellt perspektiv*, Festskrift till Sveriges Adokatsamfund, 1987, p. 203.

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the fact that the tortfeasor has liability insurance when deciding whether liability should be fully or only partly upheld.

The use of insurance as a means of compensating the injured party is particularly widespread in relation to personal injuries. Numerous special schemes ensure that the injured party is compensated by way of insurance.[16] Under Danish law the Workmens Compensation Act (ASL) and the Patients Insurance Act (PFL) are examples. More generally speaking, the widespread use of insurance has become a characteristic feature of modern society. Still new types of insurance occur. The most far-reaching consequence of the use of insurance is that it has decreased the need to uphold the individual liability as a means of compensating the injured party. In Danish law, this is expressed in the EAL § 19, that establishes the general rule of no liability if the damaged property is insured by means of first party insurance.[17] In sum, modern tort law can be said to have moved from subjectivity and individuality to objectivity and collectivity.[18]

2 Direct Claims Against the Insurance Company

The use of insurance raises the question of the relationship between the injured party and the insurance company. One aspect of this problem is the extent to which the injured party should be allowed to make direct claims against the liability insurance company of the tortfeasor. Although personal injuries are to a considerable extent dealt with under special schemes there are still areas of the law where this is not the case. The rules on direct claims are relevant in relation to these cases and in relation to physical and purely economic loss cases.

From a traditional point of view direct claims against the liability insurance company should not be allowed since this would be contrary to the principle of privity of contract. Historically, this was also the vantage point in Scandinavian law. Liability insurance was seen as a contract between the insurance company and the insured which the insured had entered into in order to achieve protection against economic loss. The insured could claim payment under the insurance if he was liable towards the injured party. Thus, the liability issue and the insurance issue were kept apart and dealt with as two separate questions.[19] The purpose of the liability insurance was to secure the tortfeasor against liability whereas the interests of the injured party were secondary. Yet, as the view that tort law and insurance law are to be regarded not as separate but as intertwined disciplines has gained ground, liability insurance has to some extent come to be

16 See Lødrup, *Erstatning, kollektive forsikringsløsninger eller andre særordninger*, LoR 1990, p. 571 ff.

17 On the parallel rule in Norwegian law, see Trine-Lise Wilhelmsen, *Samspillet mellom forsikring og erstatning ved tingsskader*, Jussens Venner 1990, p. 152 ff.

18 For a more detailed description of this development and the parallel development in the area of contract law, see Ulfbeck, *Kontrakters relativitet*, 2000, p. 31 ff.

19 For an apt illustration of this thought, see Dagfinn Dahl, *Om ansvarsforsikring*, 1929, p. 155.

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regarded as serving also the interests of the injured party.[20] This is reflected in the rules on direct liability.

Voluntary Liability Insurance

With the introduction of the Scandinavian Insurance Acts around 1930 the position of the injured party was strengthened. According to the Danish Insurance Act of 1930,[21] section 95, subsection 1, and according to the Swedish Insurance Act of 1927,[22] section 95, subsection 3, and the former Norwegian Insurance Act of 1930,[23] section 95, subsection 3, the injured party under certain conditions has the right to sue the insurance company directly. The three sets of rules are similar as to the general principles but vary in detail. Whereas the Norwegian rules have now been changed, the Danish and Swedish rules are still the same. The rules apply to compulsory as well as voluntary liability insurance and regardless of whether liability is based on strict liability or negligence. Under the Danish rule,[24] the injured party can sue the insurance company "directly" only after the liability of the tortfeasor and the size of the damages payable have been established. This means that unless the insured recognizes liability, the injured party is always forced to sue the insured prior to an action against the insurance company. It is open for discussion whether this kind of action should be called a direct action at all. The same restriction is not found in the Swedish or former Norwegian rule. On the other hand these rules apply only in cases where the tortfeasor has gone bankrupt. The Swedish rule in addition requires assignment of the claim.

Under all three sets of rules the direct claim is subject to a double limitation.

> First and foremost, the injured party does not have an independent claim against the insurance company but only a right to step into the shoes of the insured against the insurance company. If the insurance company is not obliged to pay the tortfeasor because he has acted with gross negligence or because the contract is void, the injured party has no claim against the company. Secondly, the direct claim cannot exceed the amount of damages payable by the insured to the injured party. Thus, negligence on the part of the injured party can be claimed as a defence by the insurance company.

Through the application of the principle of double limitation the rules on direct claims establish primarily a formal abrogation from the principle of privity of contract. Furthermore, this merely formal abrogation comes into play only when certain requirements are fulfilled. In sum therefore, the Danish and Swedish

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20 On the interplay between tort law and insurance law in general, see Trine-Lise Wilhelmsen, *Samspillet mellom forsikring og erstatning ved tingsskader*, Jussens Venner 1990, p. 149 ff.

21 Act no. 129 of 15.4. 1930.

22 Act (1927:77).

23 Act no. 20 of 6.6.1930.

24 On the rule in general, see Ivan Sørensen *Forsikringsaftaleloven med kommentarer*, 2000, p. 249 ff.

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rules on direct actions establish only very narrow exceptions to the general rule of no direct liability. However, exceptions have been made broadening the protection of the injured party.

For instance, it appears to have been the intention behind the rules that the principle of dubble limitation should be modified in cases where the insured has gone bankrupt. In these cases, although the injured party can claim only dividend against the estate he can claim full recovery against the insurance company. Thus, the intention behind the rules allowing direct claims was to ensure that the injured party would not have to share the insurance sum with the rest of the creditors of the tortfeasor since this would mean an unjustifiable enrichment of the creditors at the expense of the injured party.[25] It therefore came as a surprise when the Danish Court of Appeal in U 1998.1738 Ø reached a contrary result.

> In this case the plaintiff was injured in 1989 when using a product sold by the insured. The injured party sued the seller and was awarded damages in 1997. However, since the seller had gone bankrupt in 1993, the Court of Appeal (surprisingly) limited the damages to dividend. As the right to sue the insurance company according to the Danish rule in section 95, subsection 1, is only a right to sue for the sum payable by the insured, the Court of Appeal in a new case in 1998 reached the conclusion that also the insurance company was obliged to pay only dividend.

Although this result seems to be in accordance with the wording of section 95, subsection 1, clearly the decision is not in accordance with one of the main purposes of the rule allowing direct actions.[26] The case illustrates the need for clarification of the Danish rules on direct liability on this point.

Practical problems have called for further modifications of the principle of double limitation. The Danish rule implies that the injured party will often be forced to sue the tortfeasor (or his estate) before he can bring an action against the insurance companay. If the tortfeasor has ceased to exist as a legal person, the injured party has no remedy. Similar problems arise under the Swedish rule that requires assignment of the claim against the insurance company. If the insured no longer exists as a legal person there can be no assignment. U 1997.1306 Ø, illustrates the problem.

> In this case, the plaintiff was injured in April 1993. In August 1993 the tortfeasor went bankrupt. The plaintiff contacted the estate but was referred to the insurance company. In March 1994 the insurance company refused to pay the plaintiff who then sued the estate. The estate was represented by the lawyer representing the insurance company. In June 1994 the lawyer declared that he was not able to continue the case as the estate since February 1994 no longer existed as a legal

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25 In relation to Danish law, see *Udkast til lov om forsikringsaftaler med tilhørende bemærkninger*, Kbh., 1925, p. 135, Drachmann Bentzon og Christensen, *Lov om Forsikringsaftaler*, 2. ed., 1954, p. 478.

26 The decision was recently reversed by Supreme Court decision of March 21, 2001, allowing a direct action for the full amount. See also Vestergaard Pedersen, U1999B.219, Lisbeth Kjærgaard, *Privatansvarsforsikring i et erstatningsretligt perspektiv*, 1999, p. 317, note 615.

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> person. The Court of Appeal found that under these circumstances, the plaintiff should be allowed to make a direct claim against the insurance company.

The result in the Danish case can be seen as a narrow modification of the principle of double limitation.[27]

Basically, the Danish and Swedish rules (like the former Norwegian rule), by allowing only narrow exceptions to the general rule of no direct claim and to the principle of double limitation, reflect the traditional view, that in principle tort law and insurance law should be regarded as two separate disciplines. As described above, this view can no longer be upheld. Seen in this light, it is not surprising that the new Scandinavian Insurance Acts provide broader protection to the injured party.

The Finnish Insurance Act from 1994[28] in section 67, subsection 2, extends the protection of the injured party so that a direct claim can be made not only when the insured has gone bankrupt but also in other cases of insolvency and when liability insurance has been used as sales promotion. Also the Swedish proposal for a new Insurance Act[29] extends the protection of the injured party, stating as a general rule, that the injured party can sue the insurance company directly.[30] However, important exceptions severely limit the practical importance of this rule.[31] The most far-reaching and also the most simple rule is found in the present Norwegian Insurance Act of 1989.[32] According to sections 7-6, it is the general rule that the injured party can sue the insurance company directly.

Compulsory Liability Insurance

In particular, a general rule of no direct claim seems difficult to justify in cases of compulsory liability insurance. In these cases, it is most often clear that the liability insurance serves primarily the interests of the injured party. Nevertheless, in the absence of special provisions governing the question, compulsory liability insurance under Danish and Swedish law still falls under the general rules on direct claims described above, establishing only narrow exceptions to the principle of no direct claim. However, over time several special rules have evolved that establish direct liability in combination with compulsory liability insurance. Obvious examples are the Danish rules on direct claims on the basis of compulsory car insurance,[33] direct claims on the basis of compulsory liability insurance covering oil pollution at sea[34] and direct claims

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27 The principle of double limitation is also modified in relation to set-offs and in certain other circumstances. See Lisbeth Kjærgaard, *Privatansvarsforsikring i et erstatningsretligt perspektiv*, 1999, p. 292-293.

28 Act of 28.6.1994/543.

29 Ds 1993:39: *Ny försäkringsavtalslag*.

30 Se chapter 7, section 8.

31 The rule is dealt with in more detail below.

32 Act no. 69 of 16.6. 1989.

33 See the Danish Road Traffic Act, section 108.

34 See for instance the Danish and Norwegen Maritime Acts, section 200.

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on the basis of compulsory liability insurance covering damage caused by nuclear power systems.[35] Obviously, the fact that the tortfeasor is subject to strict liability as in the examples just mentioned simplifies the question of direct liability by reducing the number of defences that can be put forward by the insurance company. But even when liability is based on negligence, as in the case of professional liability, it is hard to imagine that a right to sue directly would seriously compromise the rights of the insurance company or be unduly complicated. In fact, the modern objective approach to the negligence question facilitates the application of the negligence rule. Accordingly, after the Finnish section 67 and after section 7, subsection 3, of the Swedish proposal one has gone a step further and established a general rule of direct liability in cases of compulsory liability insurance. Also the Norwegian rules (section 7-7) establish a general principle of direct liability in cases of compulsory liability insurance. Furthermore, since the object of the compulsory insurance is to secure the injured party, the Norwegian rules have done away with the principle of double limitation. The claim exists independently of the legal relationship between the insured and the insurance company. Thus, gross negligence or intent on the part of the tortfeasor or the fact that the insurance company has a claim against the tortfeasor does not relieve the insurance company from its obligation to pay the injured party. The obligation to pay on the part of the insurance company is to a large extent disconnected from the legal relationships between the (intermediary) parties. The only condition that must be fulfilled to make the insurance company payable is that the tortfeasor is liable. In this sense there is still a link between insurance law and tort law under the generel Norwegian rules. In contrast, this link has been cut under some of the special rules on direct liability. Under the Swedish Trafic Accident Act[36] §§ 10-11 the compulsory liability insurance covers injuries caused by the vehicle regardless of whether the owner can be held liable. A similar solution is found in the Norwegian Car Liability Act (Bilansvarsloven) of 1961. Thus, under both Swedish and Norwegian law, the legal relationship in these cases is between the insurance company and the injured party and the decisive factor is causation, not liability.[37]

Privity of Contract and Mandatory Rules

The above description has shown that over time the position of the injured party has been strengthened in relation to direct actions. This has been done by generalizing the right to sue directly and by modification and in some respects even abolition of the principle of double limitation. Eventually, one could ask whether the position of the injured party could be further strengthened by stating expressly that the rules on direct claims are mandatory. There are no rules in the Danish and Swedish insurance acts to this effect. This is not surprising since, arguably, such a rule would be superfluous read in the light of the principle of

35 See the Swedish Nuclear Liability Act, section 24.

36 Trafikskadelag (1975:1410).

37 Lødrup, *Erstatning, kollektive forsikringsløsninger eller andre særordninger*, LoR 1990, p. 578.

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privity of contract. Although today, this principle is subject to numerous modifications[38] it is still the general rule that the principle prevents giving effect to a contract purporting to have burdening effects on third parties. Therefore, a contract between the insurance company and the insured stating that third parties should not be allowed to sue directly would be without legal effect in so far as the third party has a right of direct action by law. In contrast, nothing prevents that a contract between the insurance company and the insured limits the liability of the insurance company towards the insured and thereby indirectly also towards third parties stepping into the shoes of the insured. This has raised the question of the effect of the "pay to be paid" clause often found in the P&I (protection and indemnity) insurance applied in the area of sea transport. The "pay to be paid" clause implies that the insured is entitled to payment from the insurance company only after having paid the injured party. Clearly, this clause regulates the relationship between the insurance company and the insured. The question is whether it also has implications for the right of the injured party to sue the insurance company directly. Under Swedish law, the injured party is entitled to demand that the claim against the insurance company be assigned to him in case the insured has gone bankrupt. However, as the insured under a "pay to be paid" clause has no claim against the insurance company, since there has been no payment to the injured party, it could be argued that there is no claim to assign. Similarly, under Danish law it could be argued that although the injured party is entitled to step into the shoes of the insured, under a "pay to be paid" clause there is no right to step into since the insured has made no payment. This line of thought has been recognized under English law[39] in relation to the Third Parties Rights Act (1930).[40] In the Norwegian case of Skogholm[41] the opposite result was reached. This was done by interpreting section 95, subsection 3, in the former Norwegiann Insurance Act as "mandatory". Consequently, a "pay to be paid" clause was considered invalid in relation to third parties. This case has been followed by the Swedish courts.[42] In reality, the same result could have been reached by reference to the principle of privity of contract. Thus, although a "pay to be paid clause" does not explicitly purport to have a burdening effect on a third party but only to regulate the relationship between the insurance company and the insured the clause technically rules out direct claims and effectively deprives the injured party of his legislation-based right to sue the insurance company. The principle of privity of contract also prevents judgment clauses in the agreement between the insured and the insurance company from being binding upon third parties. It is not necessary to assume that the rules are mandatory.[43]

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38 Ulfbeck, *Kontrakters relativitet*, 2000, p. 60 ff.

39 (1990) 2 Lloyd's Rep. 191 (The "Padre Island") (No 2).

40 According to this act, the right to exercise a direct action is also a right to step into the shoes of the insured.

41 ND 1954.445.

42 See for instance ND 1988.52 (Eastholm).

43 Cf. Vestergaard Pedersen, U 1995B.220.

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In fact, by stating that the rules on direct claims are mandatory new problems are created. This is reflected in the new Norwegian and Finnish Insurance Acts and in the Swedish proposal for a new Insurance Act, all containing mandatory rules on direct claims. Thus, it is generally recognized that the principle of privity of contract does not prevent giving effect to contracts for the benefit of third parties. However, if the rules on direct claims are mandatory the injured party is prevented from waving his right to sue directly.[44] This problem is dealt with in the Norwegian Insurance Act section 7-6, subsection 6, that expressly allows the third party to wave his right of direct action if the third party is not acting as a consumer but commercially. It is a nice question whether the insurance company under this rule can make it a term of the contract with the insured that coverage is conditioned upon the achievement of waver from the third party.

In the Swedish proposal the mandatory effect of the rules is modified in a different way. The principle of privity of contract implies that a contract with burdening effect on third parties can achieve legal effect only if such effect is legislation-based. This is the technique chosen in the Swedish proposal. According to the proposal the injured party can sue directly unless the insurance company has an agreement to the contrary with the insured. As a general rule, such an agreement is recognized provided the insured is not acting as a consumer but commercially. In other words, through the rules in the proposal, contracts with burdening effects on third parties are given legal effect. Since it must be anticipated that clauses preventing direct actions will be applied on a regular basis by the insurance companies the proposed mandatory rule in fact affords only a modest extension of the protection of the injured party.[45]

In relation to transport insurance contracts the introduction of mandatory rules on direct claims may in fact end up putting the injured party in a worse position than he was prior to the new rules. Thus, under Finnish law and under the Swedish proposal for a new Insurance Act, transport insurance contracts are exempted from the mandatory effect of the rules on direct claims.[46] As explained above, this does not mean that the insurance company by agreement with the insured can exclude direct claims since this would be contrary to the principle of privity of contract. Nevertheless, the exemption is most often seen as authorizing the use of “pay to be paid” clauses as a means of preventing direct claims. In other words, the belief that the right of direct action can only be protected against “pay to be paid” clauses by means of mandatory rules has led to the misconception that by exempting contracts from the mandatory effect of the rules, “pay to be paid” clauses can validly be used as a means of avoiding direct actions.[47]

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44 In this respect it makes sense to use the term “mandatory” in relation to the rules on direct claims.

45 Zackariasson, *Direktkrav*, 1999, pp. 230-231.

46 See, the Finnish Insurance Act, section 3, subsection 3, and likewise the Swedish proposal, 1 chapter, section 4, subsection 3, Ds 1993:39, pp. 15 and 219.

47 See, quotation in Svante Johannson, SvJT 1996, p. 745, Lennart Hagberg, SvJT 1997, p. 138, Johan Wetter, SvJT 1998, p. 47, Zachariasson, *Direktkrav*, 1999, p. 231, note 147.

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3 Conclusion

The direct action is a fairly new phenomenen. The question of the permissibility of direct actions against the insurance company should be viewed in the light of the general development of tort law and insurance law. Generally speaking, the ideological move from liberalism to welfarism has been reflected in a move in the area of tort law from a subjective and individualistic approach to a more objective and collective approach. This move implies an extension of tortious liability and an increased use of insurance as the counterpart of this extension. This development should be reflected in the rules on direct claims against the insurance company. It is therefore not surprising that the above description shows that over time there has been a general tendency to strengthen the position of the injured party. This has been done by generalizing the rules allowing direct claims and by reducing the number of arguments that can be claimed as defences by the insurance company. In contrast, it seems doubtful to what extent giving mandatory effect to the rules on direct claims has in fact afforded further protection of the injured party.

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