

Development of International Tort Law Till the Beginning of the 1990s From a Scandinavian Point of View

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1 Introduction

1.1 Legal Policy

The legal-policy debate in the field of tort law has traditionally been and remains a lively one. The reasons for this lie probably in the nature of the subject as tortious rules and principles deeply affect both societal and individual values. The way in which tort law takes shape in its various forms and is utilised in a given society also provides us with excellent guidance when it comes to assessing that society as a whole.

Modern international and Swedish tort law doctrine discuss legal-policy issues openly. In Sweden, for example, the preparatory works to the Damages Act from 1972¹ are riddled with legal policy. Whilst legislative moves in certain countries are conducted in the same spirit, others however are more reserved. The reticence shown by the legislature of one country as compared to another can perhaps be best explained by virtue of differing legislative traditions. The narrower legislative motifs a country operates under, the less possibility for outspokenness with regard to legal-policy viewpoints.

Even the courts' tendency to discuss legal-political issues varies from country to country. In the USA and England, arguments of legal policy would seem to appear more openly- suffice to say that this is not always the case. Although it is difficult to establish exactly when American and English courts will broach legal policy arguments, we do not have to travel far back in time to trace the origins of this development. Leon Green observed as late as in 1959 concerning American tort law that the courts only discussed legal-political issues openly on the rarest of occasions, and certainly only as the exception as opposed to the general rule.² As we well might guess, legal-policy contributions in the American judicial system could hardly be called novel introductions to the legal system. In Sweden, the impression is that legal-policy issues influence the administration of justice, even if this does not reveal itself explicitly in the case law of the court. It may be that legal-policy opinion has more influence in this area of the law than in others where legal-policy is evidenced through precedent.³ The Courts have certainly not remained uninfluenced following the fresh pace that was dictated by the proposed Damages Act government bill.

¹ Skadeståndslag (1972:207).

² See L. Green, *Tort Law Public Law in Disguise*, Tex. L. Rev. vol. 38 (1959) from page 1. At p.6: "Nor do the courts with rare exceptions yet adequately discuss the policies that lie beneath the doctrine. Instead they line up the cases, match competing doctrines and their numerous confinements. The art of giving law from behind a veil, through a voice from a cloud or a bush, by finding tablets of stone, or by appealing to precedent or the ambiguous words in earlier opinion or text, is by no means a lost art".

³ Another area of Swedish law that has been strongly influenced by legal-political considerations is the law of contract. See further; J. Hellner, *Högsta domstolen och avtalsrätten*. From: Högsta domsmakten i Sverige under 200 år. Stockholm 1990, from p.201, and especially the conclusions at p. 232.

1.2 Multiple Tortfeasors

Traditional tort law is based on the single case, where there is only one wrongdoer. Nevertheless, the rules that apply when multiple (concurrent) tortfeasors are liable play a very important practical as well as theoretical role and should be given greater attention than has hitherto been customary. These rules can be divided into three sections: conditions of liability, form of liability (full or apportioned liability?) and, when the liability is full – the normal case – contribution between the liable tortfeasors.

A more comprehensive approach ought to take place when the rules relating to multiple tortfeasors are applied. All the three sections of rules ought to be applied at the same time if possible. The tendency, noticeable in Swedish tort law, of expanding the circle of liable tortfeasors can prove expensive for society on the whole because of the costs that are related to contribution actions. A better solution can be brought about by channelling liability. A directly apportioned liability between the tortfeasors could in some cases be a substitute for the full liability a tortfeasor usually is faced with for damage done by all. Regard must always be taken, however, to the existence of insurances.

International literature on multiple tortfeasors reveals a trail of thought that rather decisively rejects more legal policy accentuated considerations. This method, concentrating on a more “legally-logical” approach, has found its perhaps most dedicated, present day supporter in the French legal scholar François Chabas.⁴ It should be noted, however, that this approach has proved too detached from reality, needlessly shielding cases of multiple tortfeasors from tort law as a whole. There would seem no cause not to take legal policy considerations into regard when analysing cases of multiplicity (cf. 3.2.5.2 below).

If we were to examine the way in which tort law has developed on the whole- looking at the wider connections- then these matters would perhaps stand out more. Cases involving both singular and multiple tortfeasors have followed mainly the same if not similar developments. In certain instances of multiple tortfeasors, however, there do exist divergences from the general pattern that deserve special attention. Therefore special attention will be paid in the following to the question of multiple tortfeasors.

Only a few fundamental issues concerning the general development of tort law shall be discussed in this article. The present account will focus further on the following two topics: Tort law in the present (see 2 below) and Fundamental ideas of legal policy (see 3 below).

⁴ See especially his book *L'influence de la pluralité de causes sur le droit à réparation*, Paris 1967.

2 Tort Law in the Present

2.1 “The Death of Tort”?

2.1.1 General

On the one hand, tortious rules have since at least the end of the nineteenth century undergone a vigorous development. The conditions of liability have been displaced to the benefit of injured parties, and in this sense tort law is said to have undergone a “hypertrophy”.⁵ At the same time the regulatory system has become more nuanced and detailed as a whole – a development that persists today.⁶

On the other hand, tort law has also diminished in importance over the last few decades. The reason for this lies in part beyond the system of norms. However, tort law itself has contributed significantly to this development. It is an exceptional dissatisfaction that this discipline has brought with it.

The entire foundations of the tortious system started being called into question, a situation few areas of the law have been made subject to. It would be no exaggeration to speak of this pursuit in terms of a persecution- a persecution that took place in many parts of the world and found a great deal of support amongst legal scholars, legislators and judges alike. They have all criticised tort law, which in turn has led to many reform proposals and some actual reforms themselves.

The first more assiduous signals of change appeared already before the middle of the twentieth century. Perhaps the most tried test involved contrasting tort law with social (national) insurance). The social insurance scheme afforded injured parties a larger degree of security than tort law was in a position to provide. James Fleming, an American legal scholar, belonged to those dissatisfied with the current state of affairs, arguing along the lines stipulated above. This is not to say that he rejected the idea of a tortious system altogether- according to him, it was important to retain the system, at least in part.⁷ But he envisaged a progression towards a novel system where tort law was partially replaced by various insurance schemes.⁸ With regard to personal injury cases he

⁵ T. Honsell & F. Harrer, *Schaden und Schadensberechnung*, JUS 1991, from p. 441, at p. 441.

⁶ It may today seem to have been at its strongest during the latter part of this period of time. Previously, however, the development that took place towards the end of the 1800’s was perhaps just as revolutionary. Fr. Géný started a review of a couple of theses (M. Teisseire, *Essai d’une théorie générale sur le fondement de la responsabilité*, Paris 1901, and G. Ripert, *De l’exercice du droit de propriété dans ses rapports avec les propriétés voisines*, Aix-Marseille 1902) in *Revue trimestrielle de droit civil* 1902, at p. 812 with the following testimony: “La théorie de la responsabilité compte, sans contredit, parmi les matières du droit civil, qui ont été le plus vaillamment remuées et, en apparence au moins, le plus profondément bouleversées dans les vingt dernières années du XIXe siècle”.

⁷ Cf. F. Lejman, *Skadeståndet I nutid och framtid*. From: *Festskrift tillägnad Karl Olivecrona*, Stockholm 1964, from p. 418, at p. 430.

⁸ No other American legal theorist better represents the beginning change of values at issue here than James. What he reacted against in tort was especially what he understood as expressions of the extreme individualism of the early industrial revolution. For this reason he

pointed out the benefits yielded under the more developed American National Security Insurance system. According to James, very few wrongdoers had third party liability insurance or sufficient private resources to cover damages, and even those that were covered financially still found themselves hampered by the fault rule and their own disadvantageous bargaining position.⁹

The scepticism displayed by James against preserving the tortious system has in recent years undergone a revival in America, with legal scholars expressing their renewed doubts as to the continued existence of tort law in the future. Tort law has fallen into the same awkward situation as contract law had done in the 1970's in the wake of Grant Gilmore's seminal piece, aptly entitled "The Death of Contract".¹⁰ John Fleming, basing himself on his colleague and fellow American's work, went about formulating the analogous existential question within the field of tort: "The Death of Tort?".¹¹

The potential dissolution of tort law in Sweden was discussed as early as the 1940's. The debate was open and public, involving many others than those eventually put in charge of formulating the actual reforms themselves.¹² The wave of criticism had at any rate swept over most western countries by the late 1960's,¹³ and tort law now stood at a juncture.¹⁴

If the criticism had reached its zenith in the 1960's, it certainly did not burn out, continuing well through the 1970's and 1980's. The critiques were based on a number of grounds,¹⁵ the first of which directed itself against the fault rule.¹⁶

fought against, for example, the theories concerning contributory negligence (see his contribution in Yale L.J. vol. 62 (1953) from p.691) and assumption of risk (see his critique in Yale L.J. vol. 61 (1952) from page 141, especially at p. 168). His view of the general development towards the middle of the 1940's appear clearly in one of his pieces : *Accident Liability: Some Wartime Development*, Yale L.J. vol. 55 (1945-1946) from p. 365. When it came to the transition to a new law of compensation, James put a lot of his trust in the jury, who according to him would well preserve the rights of injured parties, see especially his account *Functions of Judge and Jury in Negligence Cases*, Yale L.J. vol. 58 (1948-1949), from p. 667.

⁹ See James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, Yale L. J. vol.57 (1948), from p. 549, pp. 569-570.

¹⁰ See Gilmore, *The Death of Contract*. Columbus, Ohio 1974, a piece based on a series of lectures held in 1970.

¹¹ J. G. Fleming, *An Introduction to the Law of Torts*, 2nd ed. Oxford 1985, at p. 172, alluding to Gilmore's *The Death of Contract*, see note 10 above.

¹² See e.g. the debate between T. Lovén and C. Borgström in SvJT 1944 (pp. 165 and 689 for the former; p. 460 for the latter).

¹³ See e.g. for Denmark, S. Jørgensen, *Ersatz und Versicherung*, VersR 1970, from p. 193, at p. 270; for Sweden, F. Lejman, in note 7 above *op. cit.* p. 418, at p. 428, where "a number of dark spots in the tortious system" are portrayed.

¹⁴ Cf. J. G. Fleming, *Contemporary Roles of the Law of Torts. Introduction*, Am. J. Comp. L. vol. 18 (1970), from p. 1.

¹⁵ See Atiyah's *Accidents, Compensation and the Law*, 4th ed. Edited by P. Cane. London 1970, from pp. 217 and 417; cf. even with Atiyah, *American Tort Law in Crises*, Oxford J. Legal Stud. vol. 7 (1987), from p. 279. For a perspective from a law and economics point of view, see e.g. G. Calabresi, *Optimal Deterrence and Accidents*. To Fleming James, Jr., *il miglior fabbro*, Yale L.J. vol. 84 (1975) p. 656. From later years, see e.g. André Tunc's assessment in Rev. intern. dr. comp. 1990, *Book Review*, from p. 423, at p. 423: "c'est un mécanisme lent,

The official suspicion about tort law in Sweden can be said to have reached its peak in 1972, as the Minister propounded the broad outlines of reform proposals in this field: The Damages Act bill. The Minister summarised his critique in seven points, which took aim at compensation for personal injuries:¹⁷

1) Due to the precondition of fault, damages would be made out randomly and without any regard to concrete compensatory needs.¹⁸ The rules provided no solution to the numerous cases where the cause of injury was an accident or self inflicted harm. This resulted in a completely unsatisfactory situation in terms of considerations of justice and safety.¹⁹

2) The principle of full compensation could lead to the situation where a high-income earner had the right to claim the full amount of damages from the wrongdoer, regardless of any financial hardship or ruin that such a payment would cause. This was not acceptable after taking into account considerations of social justice and the national economy. As a consequence, the rule was not considered practicable as an instrument to achieve a rational distribution of the costs following an injury.

coûteux, fondamentalement aléatoire, donc injuste, et qui, s'il fonctionnait mieux, n'aboutirait guère qu'à ratifier les coups du sort".

¹⁶ From the comprehensive international literature on the subject, one can point more randomly to the criticism directed by B. von Eyben against the fault rule in *Lægeansvar*. From: Medicinsk Etik, Copenhagen 1985, from p. 232; almost all of the arguments raised against the rule may be found here. See also Atiyah's *Accidents, Compensation and the Law* (note 15 above), p. 411. It is not uncommon to place an equal sign between the fault rule and tort, in either a Swedish or an international context. Cf. G. T. Schwartz, *The vitality of negligence and the ethics of strict liability*, Ga. L. Rev. vol. 15 (1981), from p. 963, at p. 977, where it is stated that "the very idea of liability in tort seems tied to the assumption of liability founded on some fault-related standard". It also is not unusual that personal injuries enter into the picture in criticisms directed towards the fault rule.

¹⁷ See prop. 1972:5, from p. 85; and, about the development in a larger perspective, the detailed analysis in B. Bengtsson, *Det skadeståndsrättsliga reformarbetet*. From: Juridiska Fakulteten vid Uppsala universitet. Uppsala University 500 years. Uppsala 1976, from p. 81, at p. 90. Accounts in points of the kind set out below were commonly found in the international literature on tort law. See e.g. P. S. Atiyah, *Accidents, Compensation and the Law*, 1st. ed. London 1970, from p. 449 (cf. B. W. Dufwa, *Vår komplicerad trafikskaderätt och framtiden*, SvJT 1979, from p. 401, at p. 463); I. Englard, *Reform of the automobile accident compensation system*, Is. L. R. vol. 9 (1974), from p. 234, at p. 245 and P. Keeton & R. Keeton, *Cases and materials on the law of torts*, St. Paul, Minn. 1971, at p. 458. This practice is also witnessed in reform work the world over.

¹⁸ One of the most critical contributions aimed at fault liability is written by an American legal theorist, Clarence Morris. In an article published in 1952, he asserted that it was completely arbitrary to work with the terms of "foreseeability" and "unforeseeability". He believed that in one way, all things were foreseeable, and in another way, nothing. Everything depended on the circumstances. (See his article *Duty, Negligence and Causation*, U. Pa. L. Rev. vol. 101 (1952-1953), from p. 189, p. 196.) This argumentation is nevertheless rejected decisively in H. L. A. Hart & T. Honoré, *Causation in the law*, 2nd. Ed. Oxford 1985, at p. 257.

¹⁹ From recent years, cf. S. Frédérique, *Risques modernes et indemnisation des victimes de lésions corporelles. Une alternative à l'extension de la responsabilité civile: l'assurance contre les accidents à caractère indemnitaire*. Brussels 1990, at p. 12: "Principale lacune de notre système de responsabilité civile: l'absence d'indemnisation ou l'insuffisance d'indemnisation de certaines victimes".

3) The culpa rule had no regard to the fact that there is never one, typical connection between the degree of liability and the amount of damage caused, and this in turn could lead to unreasonable harshness in its implementation.²⁰

4) The rule on contributory negligence could not satisfy the demands for socially motivated compensation either.

5) A lack of means could also lead to the situation where damages in practice were never paid.

6) The inherent vagueness of the norms also gave rise to problems of legal certainty.²¹

7) The system was costly,²² not least due to the fact that many of the payments to injured parties were often delayed.²³ The machinery of justice sometimes runs too slow.²⁴

²⁰ In this direction also: A. F. Conard, *The Economic Treatment of Automobile Injuries*, Mich. L. Rev. vol. 63 (1964-1965), from p. 279, p. 291; P. Tercier, *Quelques considérations sur les fondements de la responsabilité civile*, ZSR 1976, I, from p. 1, p.7, with reference to amongst others G. Petitpierre, *La responsabilité du fait des produits. Les bases d'une responsabilité spéciale en droit suisse à la lumière de l'expérience des États-Unis*. Geneva 1974, pp. 138-139.

²¹ From the international debate, see S. D. Sugarman, *Doing Away with Personal Injury Law. New Compensation Mechanisms for Victims, Consumers, and Business*. New York, Westport (Connecticut), London, at p. 38.

²² Cf. *Reporter's Study on Enterprise Responsibility for Personal Injury: The American Law Institute*. April 15, 1991. Vol. II: *Approaches to Legal and Institutional Change*. Philadelphia 1991, pp. 557-558: "recovery (...) depends on access to the system through lawyers. A large percentage of the tort system's resources are inevitably consumed by the process of deciding defendant fault and plaintiff entitlement rather than going toward compensation for the plaintiff". Cf. also Sugarman, *op. cit.* at p. 40: "(...), the tort system is fabulously expensive to operate in comparison to modern compensation systems".

²³ "Those who give quickly, give double" (*bis dat qui cito dat*), is the Latin proverb called upon here.

²⁴ This observation was internationally rooted. A shorter article in the Harvard Law School Bulletin, *Crisis in the Courts* (vol. 7 (1955), from p. 15), by David W. Peck – a judge of the Appellate Division of the Supreme Court in the State of New York – seems to have started a fire under the whole problem (the expression "Justice delayed is justice denied" emanates from Peck, according to R. S. Marx, *Compensation Insurance for Automobile Accidents Victims: The Case for Compulsory Automobile Compensation Insurance*, Ohio St.L. J. vol. 15 (1954), from p. 134, at p. 138). Peck attacked in particular the jury system: "A jury trial is not only slow and expensive in itself, but the accumulative delay, increasing the lawyer's burden and the risk of a miscarriage of justice and postponing realization on just claims, is undoubtedly reflected in excessive contingent fee arrangements, inflated verdicts, excessive insurance premiums and the public expense of maintaining the court system" (Peck, *op. cit.* at p.16). Experiences of the inconveniences of delays in the field of compensation law became particularly clear by virtue of American studies concerning traffic injuries. (See e.g. C. Morris & J. C. N. Paul, *The financial impact of automobile accidents*, U. Pa. L. Rev. vol. 110 (1962), from p. 913, at pp. 923-924: "In a substantial number, particularly in the lowest income group, it took more than three years to conclude the case. Our interview reports suggest that the delays of this sort, which now seem so entrenched in our personal injury system, often may have exacted a heavy toll in terms of frustration and financial difficulty".) A heartbreaking comparison with the development in other areas was to be found in Judge Marx's 1954 cry to the heavens: "One dead every 15 minutes. One injured every 22 seconds. Every year the injured and dead equal the population of St. Louis. Four years delay in New York. Five years delay in Chicago. Delay everywhere. Hospitals crowded with automobile

It is not only fault liability that has come under fire, however. Another target of the criticism has been strict liability. The government bill for the Damages Act recommended the exercise of great caution when contemplating future introductions of strict liability. Even in the international doctrine a critical approach has appeared,²⁵ with Nordic writers such as Bo von Eyben opposing this form of liability. Von Eyben believes that legislators considering introducing strict liability often work on the basis of a specious argument. No explanation is proffered as to why the liability should be strict liability, who should ultimately bear responsibility or how should the rule function. The argument that the risk should lie with the person who enjoys the benefit of some action holds no water. According to von Eyben, one could of course claim that car drivers enjoy the immediate benefits of motoring, but it would be difficult to claim that motoring did not in some sense benefit society at large as well. Looking at product liability, we find an analogous situation: the benefits of a product will not only be enjoyed by the producer and the various levels of the market structure, but also by the consumer.²⁶

Another line of criticism against strict liability is based on the argument that it yields no more benefit than the fault liability. The idea is that if we shake up the traditional areas of tort law, give them a good airing, they will at any rate settle again- and perhaps in a different way. This has been the content of an important part of the criticism raised against strict liability in the areas of product liability²⁷ and environmental protection.²⁸

victims. No improvement in the whole miserable system in thirty years. In that period – the radio, the television, the atom – all new. The new has displaced the old – but we lawyers still cling with petrified thoughts to the dead hand of the archaic liability system – devised for the dead past” (R.S. Marx, *Reply to Case Against Compulsory Automobile Compensation Insurance*, Ohio St.L. J. vol. 15 (1954), from p. 159, at p. 159). Criticism towards delay has frequently recurred lately in tort literature. See e.g. S. M. Soble, *A proposal for the administrative compensation of victims of toxic substance pollution: A model act*, Harv. J. on Legis vol. 14 (1977), from p. 683, at p.703; Sugarman, *loc. cit.*; Frédérique, *op. cit.* at p.12 (“Même si la victime finit par être indemnisée, ce ne sera souvent qu’après trois, quatre, cinq, voire dix ans ou même plus”). The delays have been verified statistically, see e.g. *Royal Commission on Civil Liability and Compensation for Personal Injury*. Chairman: Lord Pearson. Report. Presented to Parliament by Command of Her Majesty March 1978. London 1978. Volume 2. *Statistics and Costings* (Pearson Report 2), at p. 169. Measures against these delays have been put in place in certain countries, for example in England (see Atiyah’s *Accidents, Compensation and the Law*, note 15 *op. cit.*, at p. 272).

²⁵ See, for example, H. P. Glenn, *Judicial Authority and the Liability of the Manufacturer, or Jusq’où Peut-on Aller Trop Loin?* Am. J. Comp. L. vol. 38 (1990), from p. 555, at p. 565 (“Adoption of criteria of strict liability may therefore, perversely, make recovery of damages more expensive and onerous than it might otherwise be, and it has yet to be shown that the overall level of damages recovered represents a significant improvement from the perspective of the total pool of injured members of the population”), even though he at the same time appears critical towards the fault liability. Medicus also appears to belong to the band of legal theorists critical towards strict liability, at least within the area of environmental harm (*cf.* also M. Wandt, *Fünftes Trier Kolloquium zum Umwelt- und Technikrecht* (Veranstaltungen), VersR 1989, from 1134, at p. 1134).

²⁶ Bo von Eyben, *Kompensation for personskade I. Reformering av ulykkeskompensationen*. 2. oplag. Bind 1. Copenhagen 1983, at p. 485.

²⁷ The fault elements sneaks in here in several connections. This applies, for example, to the “defect”-term, as applied either generally or more specifically, such as when instruction

There are also those critics that have gone even further, claiming that strict liability puts the injured party in a worse situation than under fault liability.

Dissatisfaction with the tortious system is not, however, limited solely to these issues of fault liability and strict liability- the roots run much deeper. It is the individual aims of the legal norms themselves that have led many to react. Tort law has been perceived as lacking sufficiently deep social roots. A German legal scholar, Dieter Schäfer, spoke in 1972 of “die soziale Ignoranz des Schadensrechts”.²⁹

2.1.2 Personal Injuries

It was no coincidence that the Minister’s criticism of tort law was directed towards personal injury cases. The discontent with the tortious system revolves primarily around these types of cases, and we can stipulate from the outset that these cases really do stand out in a class of their own for the purposes of our discussion. What has therefore been perceived as the problem within the realm of compensation for personal injury?

One of the severest opponents in this area, Donald Harris, compares the situation of the injured party to those participating in a long, hellish hurdle race. Those who complete the race are promised a prize for their efforts, yet have no clue as to its amount or size as this will be left unto the judge’s discretion upon crossing the finish line. The judge retains the discretion to adjust the size or amount of the prize to each individual participant. None of the runners know exactly how far they will have to run, or for how long. Some of the hurdles are in place from the start- the legal rules – whilst others can be thrown in without warning by the organisers, who obviously have an interest in reducing the number of participants that can complete the race. The size of the hurdles has been adjusted to suit the varying physical and mental capacities of the individual runners. One participant after the other drops out either due to their uncertainty or more particularly the difficulties the new additional hurdles give rise to. Others continue, but are worn down continually. The organisers, ever present alongside the track, can at any time during the race attempt to persuade a contestant to give up in return for a lump sum of money- a sum that is lower than the expected prize for completion. After initially sitting back and waiting to see which of the runners give up early without any money whatsoever, the

defects enter into the picture. In America, the problem of strict product liability is considered to lie in precisely the fact that it contains so many features of fault. See D. P. Griffith, *Products Liability – Negligence Presumed: An Evolution* (Note), *Tex. L. Rev.* vol. 67 (1989), from p. 851, p. 851 (“The current products liability doctrine engenders uncertainty and confusion, because the influence of negligence remains unstated but strong”, at p. 901). Cf. also from international case law, H. Nater, *Zur Entwicklung der Produkthaftpflicht in der Schweiz*, *SJZ* 1989, from p. 389, at p. 392.

²⁸ See e.g. A. Kiss, *Droit international de l’environnement*. Paris 1989, at p. 130, and cf. also P. W. Huber, *Liability: The Legal Revolution and Its Consequences*. New York 1988, at p. 154.

²⁹ D. Schäfer, *Soziale Schäden, soziale Kosten und soziale Sicherung. Argumente für ein Modell zur Integration aller Ausgleichsleistungen für Personenschäden in das soziale Sicherungssystem*. Berlin 1972, at p. 147.

organisers will then up their attempts to persuade the last remaining participants to settle. The amounts of these settlements will ultimately rise in proportion to how far the various runners have got. The majority of the runners will give up at some stage, whilst those that stay in the race may well be disappointed by the prize money they are awarded.³⁰

The most difficult problem the contestants face is of course the uncertainty concerning the conditions for winning the prize. Few modes of expression have been so well received in the tortious debate³¹ as that found in the title of Terence Ison's book "The Forensic Lottery. A Critique on Tort Liability as a System of Personal Injury Compensation" published in 1967.³² This lottery of fortunes has also been the object of other dramatic accounts in legal literature, including works by the French writer André Tunc and the American Jeffrey O'Connell.

Whilst uncertainty affects the injured party, it is also worth noting that both the wrongdoer and the third party liability insurer will also suffer the same handicap. The rules of the game ("les règles du jeu") are in this sense to a certain extent unbeknownst to all.³³

The question of tortious liability that invoked so many despondent cries in the 1970s – cries that have not since relented³⁴ – still exists to a large extent today.

Against this background, it is easy to spy the main and decisive question in the field of personal injury claims: whether some other more appropriate form of compensatory system can replace the current system. The lack of any conscientious and thorough empirical studies on the matter made finding an answer to this question all the more difficult. The situation has improved,

³⁰ D. R. Harris, *Clams for Damages: Negotiating, Settling or Abandoning*, from: *Compensation and Support for Illness and Injury*. Oxford 1984, from p. 79, at pp. 132-133. Harris probably belonged to the bitterest critics of tort, and his understanding does not seem to have changed during later years either. See e.g. his article *Can the Law of Torts Fulfil Its Aims?* N.Z.U.L. Rev. vol. 14 (1990), from p. 113: "The overall conclusion must be that tort law has a very limited role in modern society" (at p. 122).

³¹ See e.g. the title of J. O'Connell, *The Lawsuit Lottery. Only the Lawyers Win*. New York, London 1979 and Sugarman, *op. cit.* (note 21 above, at p. 38 ("It is no wonder, then, that many people view tort law as a lottery")), and G. Durry, *La responsabilité civile du médecin en droit français*. Journées de la Société de législation comparée Année 1987, from p. 195, at p. 217 ("(...) la faute, don't l'application tient parfois de la loterie, (...)").

³² Franklin may possibly have come before Ison. The same year as the latter's work came out, Franklin published an article entitled *Replacing the Negligence Lottery: Compensation and Selective Reimbursement* in Va. L. Rev. vol. 53 (1967), from p. 774.

³³ A Canadian registrar emphasised in a symposium from 1987 concerning personal injuries compensation the need for solidity in the regulatory system:

"Je crois que l'essentiel du problème, à l'heure actuelle, c'est que les règles du jeu ne sont pas précisées. Alors, pour un assureur, ça crée une situation à peu près intenable que d'avoir à assumer des risques qui vont changer en cours de route, C'est comme pour l'équipe ou pour le joueur qui participerait à un match où les règles du jeu changeraient continuellement en cours de route; ce serait tout à fait intenable. Alors je pense que c'est là que réside l'essentiel du problème, et que si l'on veut s'approcher d'une solution il va falloir que les règles du jeu soient davantage définies que présentement". Y. Brouillette, R.G.D. vol. 18 (1987), from p. 80, at p. 87.

³⁴ See from later years, e.g. I. Malkin, Melb. U.L. Rev. vol. 17 (1990), from p. 685, with the enlightening title *Unequal Treatment of Personal Injuries*.

however, following a study conducted by von Eyben in Denmark, based on the Danish state of affairs.³⁵ From this research, we can deduce the following:

Comparing tort law with the role played by social insurance, covering also occupational injuries insurance, and private insurance, one notices that tort is the least important. Comparing tort law to social insurance, apart from occupational injuries insurance, the difference is particularly striking: tortious liability covers 10.1% of all compensatory payments, whilst social insurance covers a whopping 61.3%. A comparison of tort on one hand, occupational injury and private insurance payments on the other hand, reveals a more modest difference, with occupational injury insurance covering 16.2% and private insurance making up 12.4%.

However, if we were to look at various types of accident, then the result becomes a different one. Tortious liability plays an essential role in traffic injury cases, covering 17.7% of all compensatory payments, but a much slighter one with regard to accidents at work (1.2%), accidents in the home (1.6%) and others (3%).

Similar or less ambitious studies carried out in other countries have usually been conducted along the same lines. The most common conclusion drawn has called for the abolition of tortious liability in the area.³⁶ It has been argued that the liberated resources should instead be used to improve those existing compensatory arrangements most in need.

The criticism raised against the rules of tortious liability can be of a general nature, aimed at both the conditions of liability and the calculation of damages—an all-encompassing reform is what is called for. But the criticism can also be limited solely to the former, with the calculation method heralded instead, and this is what has happened with regard to the Swedish collective insurance arrangements. By setting up an entirely new system of compensation based on this view, the situation of the injured party would be improved as regards the conditions of liability whilst at the same time retaining the prevalent tortious principle of full compensation. This method has received a fair share of praise in international doctrine.³⁷

³⁵ See B. von Eyben, *Kompensation for personsakde II. En rettsociologisk undersøgelse af erstatningsrettens og andre kompensationsssystemers funktion ved ulykker med personsakde*. Copenhagen 1988, at pp. 509 (Table 15.8) and 511 (Table 15.10). See also at p. 633 (Table 21.11, col.3 in comparison with Table 15.8, col.8).

³⁶ One example of a smaller study arriving at this result is M. A. Franklin & J. E. Mais, *Tort Law and Mass Immunization Programs: Lessons from the Polio and Flu Episodes*, Calif. L. Rev. vol. 65 (1977), from p. 754, wherein the American experiences of injuries caused in connection with mass vaccination is dealt with.

³⁷ Simon Frédérique concludes his attack on tort in the personal injuries area with the following words:

“La critique fondamentale a trait aux lacunes dans l’indemnisation de victimes de lésions corporelles.

Ces lacunes ne se rapportent pas au niveau de celle-ci. Dans les cas où s’applique le droit commun de la responsabilité (articles 1382 et s. du code civil), l’indemnisation est totale: celui qui par sa faute cause un dommage, doit le réparer intégralement. Comme la réparation couvre à la fois le dommage économique et le dommage moral, elle est par définition satisfaisante.

2.1.3 Property Damage

If there is great uncertainty surrounding the question of the conditions of liability in the context of personal injury, there is certainly no less concerning damage caused to property. Even this area has seen a number of dramatically propounded suggestions. The proposals adopted by the Swedish Tort Law Committee have gone a long way as far as a phasing-out of tortious liability for damage to property is concerned. The Committee found that liability in tort should be abolished in cases where the owner has insured his or her property. Nevertheless, they also concluded that there were certain exceptions to this general rule that warranted specific attention, such as where the wrongdoer's actions are intentional or grossly negligent and also in certain cases of public enterprise or employment related activity. The American legal scholar Richard L Abel went even further than this, calling for the abolition of tortious liability for material damage altogether. Abel believed that criminal sanctions would suffice when dealing with cases involving intentional or grossly negligent acts on the part of the wrongdoer. He believed that life would, for all intents and purposes, remain the same after such a reform as it had been before.³⁸

2.1.4 Pure Economic Loss

Even the right to damages for pure economic loss has been criticised, albeit that the criticism has not been aimed at removing liability in this field. On the contrary, the calls are for a strengthening of the tortious liability. In Sweden, the right to claim compensation for this kind of damage has been extended in recent years by both the courts³⁹ and through legislation.⁴⁰ The delimitation on this

Ce qui est inadmissible, c'est que certaines victimes ne reçoivent rien ou ne sont indemnisées que pour une fraction de leur perte. Certaines d'entre elles, qui n'ont commis aucune faute, ne parviennent pas à exercer de recours contre l'auteur de l'accident. Tel est le cas si celui-ci demeure inconnu, s'il est exonéré de toute responsabilité (en cas de force majeure par exemple), ou simplement s'il est insolvable". Frédérique, in note 19 above *op. cit.* at p. 220.

³⁸ "My position is not particularly radical. Property owners still would be able to protect their entitlements through contracts (which might make explicit provision for the rights currently derived from notions of third-party beneficiary and implied warranty), by insurance, and by avoiding or reducing risks to their property. This proposal would effect no major change in the distribution of wealth or power, although enjoyment of property would become more expensive. It would not threaten capitalism. Indeed, my proposal may have greater ideological affinity with laissez-faire economics than with socialist ideals. There are a few identifiable interest groups that stand to lose – personal injury lawyers, for instance – but they have no real power base, notwithstanding their successful defence of the status quo in recent years. Private insurance companies are likely to make as much money writing loss insurance as they have writing liability insurance. Courts cannot be attacked for judicial activism (...)", Abel, *Should tort law protect property against accidental loss?* From: *The Law of Tort. Policies and Trends in Liability for Damage to Property and Economic Loss*. Edited by M. Furmston. London 1986, from p. 155, at p. 177.

³⁹ See thus NJA 1987, p.692.

⁴⁰ Above all the amendments to the Damages Act towards an improved right of damages from the State and local community when it comes to harm caused in the exercise of public

right as found in Chapter 2 Section 4 of the Damages Act has been attacked by Kleineman⁴¹, who has received support for his critique in legal doctrine.⁴² A more developed alternative for compensation for economic loss arising in recent years saw the loss in connection with the general question concerning increased welfare through more effective competition.⁴³

2.1.5 Non Pecuniary Damage

If the Swedish indicators are on point concerning liability for personal injury and material damage on the one hand and for pure economic loss on the other, the situation is completely different with regard to non-pecuniary damage. For a long time uncertainty has shrouded the question which direction the trends are leading – if any direction is to be spied at all. This is understandable, given the difficulties in working with this form of harm. The right of compensation in these cases has been attacked on the international arena, and the debate has led to many and varied points of view.⁴⁴ Inversely, it has been claimed that this right has been too narrow, with supporters of this view criticising the refusal to accept a right to claim compensation for general injury in particular areas and also the low awards of damages.

The official Swedish approach from an international perspective could probably be seen as traditionally reluctant to allow compensation for this kind of harm.⁴⁵ The lack of a more comprehensive understanding of the problems that

authority. Furthermore, Section 1 (2) of the Environmental Harm Act deserves notice; a rule which prescribes the right to compensation for pure economic loss on condition that the damage is “of some importance”. See also B. Bengtsson, *Den svenska miljöskadelagen och det finländska lagförslaget*. From: Nordiska miljörettsliga uppsatser. Miljörettsliga sällskapets i Finland publikation nr 17, 1991, p. 26.

⁴¹ See J. Kleineman, *Ren förmögenhetsskada. Särskilt vid vilseledande av annan än kontraktspart*. Stockholm 1987, especially chapters 4 and 5.

⁴² See thus C. M. Roos, *Book Review*, SvJT 1988, at pp. 47 and 313.

⁴³ See SOU 1991:59, Part 2, at p. 281. The idea has been followed up in prop. 1992/93:56, at p. 32.

⁴⁴ A legal scholar such as André Tunc is in principle sceptical towards compensation for general or intangible harms. In one breath he could direct criticism founded in legal policy against this type of benevolence towards the injured party. In the next, he would more ridicule this compensation. In France, compensation for intangible harm would thus be made out for the loss of a precious thing, such as a horse for example (*cf.* Dufwa, *Book Review*, SvJT 1988, from p. 532, at p. 537). Why, Tunc asks – in connection with Léon Mazeaud – should one not be able to imagine making out general damages to the horse for the loss of its owner? Tunc, *Jalons. Dits et écrits d'André Tunc*. Paris 1991, at p. 146.

⁴⁵ This applies to both the possibility of obtaining such compensation in specific areas (see, for example, the Minister's unwillingness to introduce “anything new, in principle” in the area of environmental harm: NJA II 1986, at p.136; see also Dufwa, SvJT 1987, *Book Review*, from p. 46, at p.48), and when it comes to the size of the amount of damages. Stig Strömholm has also –primarily bearing the legal situation relating to infringements of the right to privacy in mind– emphasised that the evidently narrow view that Swedish law adopts, “internationally speaking would seem to appear old fashioned”, Strömholm, *Rätt, rättskällor och rättstillämpning. En lärobok i allmän rättslära*. 3rd ed. Stockholm 1988, at p. 267. *Cf.* the above mentioned Minister's unwillingness to introduce such a general right to compensation

these injuries give rise to has thus long been apparent.⁴⁶ The Government has attempted to remedy this by setting up a Commission in 1988 to review the regulatory framework in this area in connection with personal injury etc. Its main tasks include considering whether the current level of compensation needs to be increased, which principles of remuneration should be applied and how the rules on setting the amounts of compensation should be shaped.⁴⁷ The Commission has produced two interim reports (SOU 1991:34 and 1992:84), the latest one dealing with criminal offences. This most recent report has, due to its all-embracing and fundamental nature, led to a considerable amount of support for further development in this area.

2.1.6 Borderline Damage

Certain types of damage can be said to fall somewhere between economic loss and non-pecuniary damage. They might be called borderline damage. Cases involving an irretrievable expense due to a personal injury or damage to property would above all belong to this category. This would cover the situation where a person who buys a trip or rents a cabin, with no possibility to recover the amounts paid, subsequently suffers an injury that prevents him from enjoying his spare time as he had planned. In continental terms, this is known as the doctrine of frustration.⁴⁸

It is important to note, however, that there are also other cases that fall into the borderline category. These concern, for example, ecological damage or the sacrifices involved when the injured party himself takes measures to repair damage caused.

The possibility of obtaining compensation in other countries in these types of cases is often strictly limited, if not refused outright. This goes especially for those outside of a contractual relationship or not bound by a duty in tort.⁴⁹ In

for criminal injuries during the 1988 amendments to the Criminal Injuries Act (1978:413): “There is nevertheless hardly any reason to introduce a general right of compensation for criminal injuries due to suffering in connection with crime against their personal integrity. The possibility for compensation does not appear as pressing in all situations”. NJA II 1988, at p. 82.

⁴⁶ Reason may possibly exist to treat the right to privacy as a distinct issue; for more, see further SOU 1992:84, at p. 189 with further references. See also J. Hellner, *Ersättningsrätt*. From: Svensk rätt I omvandling. Studier tillägnade H. Eek and others, at p. 186. (“A review of the right to compensation for violations of privacy, with uniform and carefully prepared principles, should therefore be counted among the more important wishes concerning Swedish compensation law.”).

⁴⁷ See dir. 1988:76.

⁴⁸ The term goes back to a “theory of frustration” that certain continental tort experts work with, and that, according to K. Larenz, *Lehrbuch des Schuldrechts*. I. Band: Allgemeiner Teil. 13th ed. München 1986, at p. 309, involves “dass Aufwendungen, die für einen bestimmten Zweck gemacht wurden, einem Schaden gleich stehen, wenn dieser Zweck durch ein ersatzpflichtig machendes Ereignis vereitelt wird.”

⁴⁹ See concerning frustration damage for German law, K. Larenz, *Nutzlos gewordener Aufwendungen als erstattungsfähige Schäden*. From: Revolution der Technik. Evolutionen des Rechts. Festgabe zum 60. Geburtstag von Karl Otfinger. Zürich 1969, from p. 151, p.

Sweden, however, one has chosen to fortify the position of the injured party in such cases. Swedish tort law has for a long time recognised the possibility to claim compensation for the loss of leisure time caused by an injury to the person,⁵⁰ and in the case NJA 1992 s. 213 the Supreme Court accepted in principle damages for loss of spare time caused by damage to property⁵¹. In this way, frustration in cases of damage to property is compensable according to Swedish tort law⁵² as far as loss of spare time is concerned. According to the judgment of the Court, remuneration could cover even the inconvenience caused the injured party who spends days off work attempting to reduce the consequences of the damage to his property and the actual repair work itself. The Court has made it clear, however, that this will only occur in the rarest of cases.

2.2 *A Bit of Both*

2.2.1 Prior to the 1980s

On the threshold of the 1980's, the author sketched out three alternative courses of action that could be taken following the eventual capture of the wolf – Swedish tort law – after so many years' persecution. Firstly, the wolf could be released. Secondly, it could be put down. Thirdly, it could be put in chains.

The legislature had chosen to follow the third course of action when it came to the traffic injury legislation in 1975, an option many in the international

151; for Swiss law, E. W. Stark, *Zur Frage der Schädigungen ohne Vermögenensnachteile*. From: Festschrift für Max Keller zum 65. Geburtstag. Zürich 1989, from p. 311 (“Das menschliche Zusammenleben bringt viele Nachteile mit sich, die einer dem andern zufügt, jedoch auch viele Vorteile, für die ebenfalls nicht Rechnung gestellt werden kann.”, at p. 320). About the difficulties faced by the victim in obtaining payment for repair works, see P.-D. Ollier & J.-P. Le Gall, *Various Damages*. From: International Encyclopedia of Comparative Law. Vol. XI. Torts. Part 2. Chapter 10. Tübingen, Dordrecht, Boston, Lancaster 1986, p. 9.

⁵⁰ See *e.g.* NJA 1948, p. 646.

⁵¹ The Court held that Chapter 5, Section 7 of the Damages Act could not – with regard to the legal development that took place after the arrival of its decision – be considered as a decisive obstacle for damages for harm caused to property to encompass even losses of leisure time, and that the issue had now partly entered a new situation following the introduction of the tortious rules contained in Section 31 of the Consumer Insurance Act 1980:38 and Section 32 of the Consumer Purchases Act 1990:932. In the preparatory works to these measures, a standpoint was taken that they should also cover losses of spare time and similar difficulties and inconveniences that could not be measured directly in terms of money, except certain less significant effects of damage that were to be considered of a pure, intangible nature. The Supreme Court held that: “To view losses of spare time as a harm of an economic nature goes over well with the general trend of according the interest in spare time and recreation increasing importance.”

⁵² In the case, the claim for damages was directed against a non-contractual party (manufacturer; product damage). The Supreme Court stated: “At any rate, there do not seem to be any weighty, objective reasons to distinguish here between compensation in and outside of contractual relations, when the damage to property as in this case concerned property for use for recreational purposes.”

debate believed to be the best way forward. Tort law was not seen as *entirely* reprehensible. To the contrary, it was perceived as sufficiently reflecting societal values to deserve preservation – at least in certain parts.⁵³

It was also this third alternative that, after receiving fairly general support, was pursued in Sweden during the 1980's. The tortious system was not done away with as one might have expected following the Minister's statements in 1972. It lived on. How did this happen?

If we are to widen the scope of the question to encompass the 1970's as well, we can deduce the following answers laid out below.

2.2.2 The 1970s and 1980s

2.2.2.1 Tort Law Reforms

Isolated tort law reforms took place in Sweden during this period. The two most significant reforms were probably the 1975 reform of the Damages Act and the introduction of the Environmental Damages Act in 1986 (miljöskadelagen 1986:225). Of the seven points raised by the Minister directed against the tortious system in the Damages Act government bill of 1972 (see 2.1.1. above), the second (full compensation) was dealt with directly in the 1975 reforms by virtue of the rule of apportionment (contributory negligence) of damages in favour of a tortfeasor with a bad economy. The fourth objection also reduced in importance following these reforms as the rules on contributory negligence were altered to the benefit of the injured person. The critique as a whole lost a lot of its significance as a result of the new compensatory systems introduced and developed throughout the 1970's.

2.2.2.2 The Cement

The other way by which Swedish tort law developed can be said to have taken place outside of the system of norms itself. The tortious rules were utilized, woven into special compensatory arrangements such as the industrial injuries insurance (trygghetsförsäkringen), the patient insurance (patientförsäkringen), the drug insurance (läkemedelsförsäkringen), the traffic accident insurance (trafikförsäkringen) and the criminal injuries insurance (brottsskadeförsäkringen). The patches (the compensatory arrangements) would be sewn onto the old coat (tort law), and as far as traffic injuries were concerned without careful attention as to the actual circumstances.⁵⁴ Employing a metaphor often expressed by Erland Conradi, a Supreme Court judge, tort law came to function like a cement between the stones that the various compensatory arrangements were otherwise built upon.

⁵³ Dufwa, SvJT 1979, at p. 485 (*cf.* in note 17 above).

⁵⁴ See particularly concerning the traffic injuries reform: Dufwa, SvJT 1979, at p. 426 and from p.465 (*cf.* note 17 above). It was said during the preparatory works to the Traffic Injuries Act that traffic insurance would be "cut loose from the rules of tort", a strong exaggeration. See *ibid.*, at p. 465.

2.2.2.3 The Agreement on the Right of Recourse

A dramatic revitalisation of the tortious rules took place in Sweden towards the end of the 1980's and the beginning of the 1990's. It happened through the conclusion of an agreement on the right of recourse between the five largest insurance companies in Sweden, effective for injuries or damage inflicted after January 1st 1989. In contrast to the old right, under the new agreement, the right of recourse generally exists for the insurer who has granted a property insurance policy against the third party liability insurance company. Recourse can only be effected if the amount of damages is higher than half the basic amount. Recourse against a private person's third party liability insurer may only be had where the policy-holder has caused harm through a grossly negligent or intentional act, or where the damage has arisen in connection with his gainful employment. The agreement does not prevent claims being brought against a policy-holder personally when it comes to excesses or compensation above the amount insured by the third party liability insurer. This is noteworthy especially as far as companies are concerned. These will now have to count on their own liability being called into question to a greater extent than previously.

2.2.2.4 Summary

Today, tort law- not only in Sweden but also in most western societies- co-exists alongside compensatory arrangements. The latter has taken over many of the functions traditionally performed by tort. Quoting Conradi, it has become a question of accepting "a bit of both"- a question of alternation.⁵⁵ The question that remains is whether this is merely a transitional period preceding the eventual death of the wolf.

2.3 *Multiple Tortfeasors*

The harsh criticism of tort has seen no difference made between cases of single tortfeasors or multiple tortfeasors, the criticised rules working just as poorly in both. Some of the points raised do not, however, have the same reach with regard to cases of multiplicity as in singular cases. The possibility of nonpayment following an award of damages (the Minister's fifth point in his criticism of the tortious system contained in the preparatory works to the Damages Act 1972, see 2.1.1. above) is substantially reduced in cases of multiple tortfeasor liability where the principle of joint and several liability applies. Non-payment due to a lack of means is more likely to occur in cases where the injured party only has one wrongdoer to pursue. On the other hand, the costs in cases involving multiple wrongdoers –relating to the Minister's seventh point– were on average much higher than in those involving only one. In this regard, not only the costs following claims made by the injured party against

⁵⁵ SvJT 1960, from p. 430, at p. 433.

multiple tortfeasors have to be taken into account, but also the costs following subsequent actions of recourse.⁵⁶

In certain respects the cases of multiplicity have fuelled critics in their attacks against tort, not least due to their complicity which can give rise to problems of legal uncertainty. More than anything, however, the complex of problems concerning lack of evidence – the Minister’s sixth point – have become an argument for those attempting to illustrate the inadequacies of tort, supporting their quest for a replacement of tort law by other compensatory systems.

One difference becomes apparent between cases of single and multiple tortfeasors as regards tort law’s relation to insurance and insurance arrangements. If there is a possibility that compensation in cases of single tortfeasors will be paid through an insurance policy or some insurance arrangement, the liability in this way not borne alone, then this possibility is even greater in cases of multiple tortfeasors. The more persons that see their liability called into question, the greater the umbrella of third party liability insurance and insurance arrangements to protect and make out payments of damages. This means that the development that has led to insurance and insurance arrangements increasingly bearing the brunt of liability for damages following injury, is more apparent in cases of multiple tortfeasors than in cases involving single tortfeasors. This becomes even more apparent where no right of recourse is exercised from these insurances and insurance schemes.

3 Fundamental Legal-policy Thoughts

3.1 Introduction

The point of departure for the legal-policy discussion stems from the bitter truth that the necessary resources required to compensate for all injuries are lacking. The pressing question in this regard is “are we getting value for our money?”⁵⁷ and this question is aimed at results. Employing a phrase coined by Torstein Eckhoff, one could say that the values upon which the question is based are directed towards the consequences.⁵⁸ As far as cases involving multiple

⁵⁶ It is also imaginable that even other liable parties than those the subject of the injured party’s interest perhaps incur investigation costs.

⁵⁷ Atiyah, *Accidents, Compensation and the Law* (note 15 above), at p. 244. According to Atiyah, the Royal Commission on Compensation for Personal Injury neglected to ask this question. Cf. also Dufwa, *Strict Liability in Tort Law*, SvJT 1987, from p. 269, at p. 273.. Cf. also even the last words in Albert Ladrets work concerning the relationship between Social Insurance and tortious liability, *L’accident de trajet avec tiers responsable*, Paris 1970, at p. 141: “Le problème qui reste à résoudre dans la bouillonnement des revendications et l’amertume des refus, est celui de savoir si le prix que l’on demande pour cette protection peut être justifié”. Cf. even Strahl in SOU 1950:16, at p. 113, concerning the right of recourse for insurers: “In testing to what degree the right of recourse should be limited, one has reason to consider whether the victim receives money for the increase of premium costs that a limitation of the right of recourse is designed to give rise to.”

⁵⁸ See T. Eckhoff, *Rettslige vurderinger*. From: Festskrift till Ivar Agge. Stockholm 1970, from p. 78, at p. 80.

tortfeasors are concerned, it seems natural to let the perspective be displaced towards the end. A result based approach that fails to take into account the final recourse apportionment comes close to something of a contradiction.

Several difficulties are connected to a legal policy based on such grounds. Eckhoff has pointed to the problems that arise due to our lack of knowledge concerning social causal relations and the controllability of values.⁵⁹ Particularly relevant for tort law becomes what he has termed the “problem of balancing-out”.⁶⁰ For the values to have meaning, they must be able to be weighed out against each other. Increased freedom to engage in injurious or harmful activities must be weighed out with increased safety of the consumers. Eckhoff asks if it is possible to work on the basis of some form of common “net-benefit” for all alternative courses of action, or whether we have to turn instead to some kind of intuitive choice between the various alternatives.⁶¹

Questions and problems of this nature may well have led to a more cautious and reserved legal-political debate;⁶² statements of absolute certainty and bold predictions alike have shown no greater ability to convince. The important thing to note, however, is that problems such as those raised by Eckhoff have failed to prevent tort law experts from diligently continuing to discuss legal-political matters. Quite to the contrary, the debate seems inexhaustible.

Certain more pressing contributions to the debate are dealt with below under the following headings: The injured party as the centre of attention (3.2) and The functions of tort (3.3).

3.2 *The Injured Party as the Centre of Attention*

3.2.1 General

In the following extract, Roscoe Pound describes the attitude in the 1800s towards the conduct of tortfeasors, characterizing American tort law:

“In the nineteenth century the conception of liability as resting on intention was put in metaphysical rather than ethical form. Law was a realisation of the idea of liberty, and existed to bring about the widest possible individual liberty. Liberty was the free will in action. (...) What had been a positive, creative theory of developing liability on the basis of intention, became a negative, restraining, one might say pruning, theory of liability except on the basis of intention. Liability could flow only from the culpable conduct or from assumed duties. The abstract individual will was the central point in the theory of liability. (...) The

⁵⁹ *Op. cit.*, from p. 82.

⁶⁰ *Op. cit.*, at p. 82.

⁶¹ *Loc. cit.*

⁶² Cf. J. Hellner’s critique of NJA 1966, p. 210, in *Ersättning till tredje man vid sak- och personskada*, SvJT 1969, from p. 332, p. 357, and Atiyah, *Accidents, Compensation and the Law* in note 15 above *op. cit.*, from p. 228 (“Pragmatism without Principle”, at p. 228).

fundamental conception in legal liability was the conception of an act— of a manifestation of the will in the external world.”⁶³

This orientation towards conduct led to a focussing on the interest of the wrongdoer. One could say, albeit with slight exaggeration, that the injured party “disappeared” out of the picture.⁶⁴ This was a common trend that continued a good way into the 1900’s. An American legal scholar could maintain as late as in 1932 that “in modern times”, regarding American and English cases, “today the law does not give principal consideration to the sufferer’s damage, but rather gives chief consideration to the blamefulness of the defendant’s conduct”.⁶⁵

It is easy to generalise. Whatever is applicable in America and England does not need to hold good in other countries. On this point, however, a generalisation is almost inescapable. In the majority of legal systems, the spotlight focussed on the wrongdoer.

This viewpoint would, however, come to shift. The interest would no longer revolve around the wrongdoer, focussing instead on the injured party.⁶⁶ Finding suitable legal-political reasoning to back this shift in focus did not prove difficult. A common argument in this vein drew a comparison between the respective situations of the tortfeasor and the injured party— with the latter emerging victorious. “If there must be a windfall certainly it is more just that the injured person shall profit therefrom, rather than the wrongdoer shall be relieved of his full responsibility for his wrongdoing”.⁶⁷ Perhaps more importantly, however, was that with this change of attitude came a new social commitment.⁶⁸

⁶³ Pound, *An Introduction to the Philosophy of Law*, New Haven (Connecticut), London 1922, pp. 157-158.

⁶⁴ One cannot naturally without further ado claim that the victim “disappeared”. The international tort debate sometimes provides such simplifications in this regard. See e.g. Schäfer, in note 29 above *op. cit.* at pp. 155-156: “Solange man sich einen Schadensausgleich nur in eindimensionalen Rechtsbeziehungen zwischen je zwei Rechtssubjekten vorzustellen vermag, muss man auf die eine Seite dieses Verhältnisses, die des Zahles, fixiert bleiben und die andere, die des Empfängers, ignorieren.” It was surely not as easy as that.

⁶⁵ R. C. Harris, *Liability without fault*, Tulane L. Rev. vol. 6 (1932), from 337, at notes 43-44.

⁶⁶ See e.g. F. James, *Statutory Standards and Negligence in Accident Cases*, La. L. Rev. vol. 11 (1950), from p. 95, at p. 95: “In view of modern trends, I believe that the objective of compensating accident victims deserves greater emphasis, and that its detailed implications for the fabric of tort law deserve more careful analysis than they have received”. A similar development can be traced in modern criminal law; in Germany one has spoken of “Wiederentdeckung des Opfers”. See for the entire development of criminal law K. Seelmann, *Paradoxien der Opferorientierung im Strafrecht*, JZ 1989, p. 670, with further references to American, English, Austrian and Swiss literature.

⁶⁷ *Grayson v. Williams*, 256 F.2d 61, 65 (10th Cir. 1958). The statement is also to be found in R. L. Birmingham, *The Theory of Economic Policy and the Law of Torts*, Minn. L. Rev. vol. 55:1 (1970), from p. 1, at p. 9.

⁶⁸ In an article by James, published in 1948 (in note 9 above *op. cit.*), he asserted the following views: “There is however an altogether different approach to tort law. Human failures in a machine age cause a large and fairly regular –though probably reducible– toll of life, limb and property. As a class the victims of these accidents can ill afford the loss they entail. The problem of decreasing this toll can best be solved through the pressure of safety regulations with penal and licensing sanctions, and of self-interest in avoiding the host of non-legal disadvantages that flow from accidents. But when this is all done, human losses remain. It is

It became increasingly common in Swedish reform work during the second half of the twentieth century to emphasise the need to strengthen the position of the injured party. This goal was also undoubtedly achieved regarding tort law generally in questions of rules applicable in a variety of special areas of harm;⁶⁹ although personal injury stood in the centre, it was by no means the only type of injury favoured by the development. This same trend has been followed in many other countries.⁷⁰ In this way we can undoubtedly say that we are dealing with an international phenomena.⁷¹

This development towards better compensatory protection for the injured party described above, has not, however, come to pass trouble-free. A number of general objections have been raised against it. One of these objections stems from the concern that the courts would be overrun by cases: “the floodgate argument”,⁷² a contention that in turn has been subject to a number of

the principal job of tort law today to deal with these losses. The best and most efficient way to do this is to assure accident victims of compensation, and to distribute the losses involved over society as a whole or some very large segment of it. Such a basis for administering losses may be called social insurance”. at p. 549. The change in climate was nevertheless felt much earlier, see *e.g.* an article by L. W. Feezer, entitled *Social Justice in the Field of Torts*, *Minn. L. Rev.* vol. 11 (1927), from p. 313.

⁶⁹ A hard beaten record in this regard was set following NJA 1981, p. 920 (see 3.2.2.2 below).

⁷⁰ In France it seems as though the new orientation in tort towards the injured party has arrived earlier than in other countries. One French legal theorist, R. Saleilles, took the side of the injured party already towards the end of the 1800's. This line in the French debate did not abate. In 1947 (*Essai d'une Théorie générale de la responsabilité civile*, Paris 1947), Boris Starck based an entire theory in favour of the victim. André Tunc's efforts complete this development. Above all, Tunc stands out as a European central figure in this connection. The injured party, he claimed, most certainly stands in the centre for the men of both jurisprudence and practice – yet these forces are not *for* but *against* him! What Tunc has in mind is the introduction of the French rules of contributory negligence which operate harshly against the injured party. See Tunc, in note 44 above *op. cit.*, at p. 212.

⁷¹ The testimonies to this development are many. From doctrine, we can more randomly refer for example to P. Lødrup, *La responsabilité civile du médecin en droit norvégien*. From: *Journées de la Société de législation comparée*, *Rev. intern. dr. comp.* 1987. No special vol. 9, from p. 219, pp. 220 and 222. See also Honsell & Harrer, in note 5 above *op. cit.* p. 441. From special areas one can note for example the development concerning product liability. Another example may be children's liability in tort. The possibilities of obtaining damages for harm caused by children increased in Sweden as a result of the restructuring of the rules of the Damages Act (1972); the child was to be treated as an adult, and it thus became easier to deem the child culpable. In France, the development has also headed in a direction favourable to the victim. The liability of the parents has been widened here; for the legal situation previously under French law, see X. Blanc-Jouvan, *La responsabilité de l'infans*, *Rev. trim. dr. civ.* 1957, from p. 28. According to P. Legrand (*Taking another look at French civil law*, *Oxford J. Legal Stud.* vol. 7 (1987), from p. 136, at p. 139, French law seems to come close to English law when it comes to liability for harm caused by very young children (“l'infans”). Legrand quotes *Winfield & Jolowicz on Tort*, according to which states that “there is no defence of infancy as such”. But the latter account also states that the quoted words had older children in mind. Concerning very young children, age may be relevant according to *Winfield & Jolowicz on Tort* when it comes to issues of “negligence or malice”.

⁷² The argument is usually seen in connection with a statement made by Lord Abinger in *Winterbottom v. Wright* (1842) 10 M. & W. 109, according to which the most absurd and exorbitant consequences came to follow, if each passenger – not to mention pedestrians – would be given occasion to claim damages, as in this case. For more on this line of reasoning,

objections.⁷³ Another objection points to the fact that extended liability easily could lead to a breakdown;⁷⁴ this apparently refers to cases where no third party liability insurance is present or where protection by insurance is limited, for example where the damages exceed the maximum insurable amount. It has been remarked that even the public could be threatened should damages for harm caused following an exercise of governmental powers be extended too much.⁷⁵ Such viewpoints are, however, rather general and insignificant. The legal-economic arguments have proved much more sophisticated.

Naturally one can also find built in barriers in the current legal system that cannot be forced without bringing the entire system crashing down. The development of product liability in America has, to the benefit of the injured party, raised the question of whether the next step should see the application of a product liability without the requirement of a defect with the product.⁷⁶ Some experts have answered this question in the affirmative.⁷⁷ Others, such as James A. Henderson and Aaron D. Twerski, have dismissed the idea altogether on

see Kleineman, in note 41 above *op. cit.*, at pp. 127, 377 and 459 (see also even Dufwa, *Book Review*, SvJT 1986, from p. 39, at p. 44), and the more in depth study, F. K. H. Maher & R. C. Evans, *'Hard' cases, floodgates and the new rhetoric*, U. Tasm. L. Rev. vol. 8 (1985), from p. 96, according to which the argument clearly is on the retreat in Anglo-American courts. See further *Reporter's Study on Enterprise Responsibility for Personal Injury*, vol. II, in note 22 above *op. cit.*, p. 383, with further references.

⁷³ See e.g. W. L. Prosser, *Intentional Infliction of Mental Suffering*, Mich. L. Rev. vol. 37 (1939), from p. 874, at p. 874: "It is business of the law to remedy wrongs that deserve it, even at the expense of a 'flood litigation'; and it is a pitiful confession of incompetence on the part of any court of justice to deny relief upon the ground that it will give the courts too much work to do". According to C. M. Roos (*Book Review*, SvJT 1988, from p. 47, at p. 50), there is all reason to question the floodgate argument; "The fact that many suffer harm does not of course need to mean that they should always bear the damage themselves". Or, why not: the more individuals that are inflicted with harm, the more urgent that tortious liability is held- see P. Cane, *Tort law and economic interests*, Oxford 1991, at p. 473. Furthermore, one could object to the floodgates argument that it fails to pay attention to the great possibilities that exist in settling tortious liability outside of court. Cf. B. S. Markesinis, *Comparative Law – A Subject in Search of an Audience*, Modern L. Rev. vol. 53 (1990), from p. 1, at p. 5.

⁷⁴ Cf. G. Anderson, *Sorichetti v. City of New York Tells the Police that Liability Looms for Failure to Respond to Domestic Violence Situations*, U. Miami L. Rev. vol. 40 (1985), from p. 333 at 336.

⁷⁵ The objection appears to be both old and internationally based. See for example the following statement concerning France by M. Hauriou in Note, Conseil d'État, S. 1918-1919. III. 25: "Toute extension des principes sur lesquels repose la responsabilité de l'État doit être surveillée avec soin. L'application des principes anciens, acceptées de tous, entraîne déjà des conséquences budgétaires telles qu'il convient d'y regarder à deux fois, avant d'admettre un principe nouveau dont la puissance d'expansion est encore inconnue." In the American discussion, it has been asserted in recent years that it is quite simply better that a few unlucky persons bear their own costs of harm than for them to shift them over to the public. Anderson, *op. cit.*, at pp. 336-337).

⁷⁶ A product liability of this kind was constructed by J. O'Connell in his work *Ending Insult to Injury. No-Fault Insurance for Products and Services*. Urbana, Chicago, London 1975.

⁷⁷ Among these we find: J. L. Diamond, *Eliminating the "Defect" in Design Strict Products Liability Theory*, Hastings L. J. vol. 34 (1983), from p. 529, and M. Z. Edell, *Risk Utility Analysis of Unavoidably Unsafe Products*, Seton Hall L. Rev. vol. 17 (1987) from p. 623.

legal-technical grounds.⁷⁸ They contend that it is precisely the notion of a defect that ties this area of tort together, and that without it the rules on product liability would collapse.⁷⁹ They are most certainly right.⁸⁰

One consequence of the trend of fortifying the legal position of the victim is that it later has not always been easy to introduce limitations on liability. The setting of seemingly reasonable limitations can give rise to opposition. A decision of the German *Grosse Zivilsenat* in 1987, stating *obiter dictum* that a limitation of the right to compensation for “luxury-losses”⁸¹ was called for, immediately gave rise to cries against “das Luxusargument im Schadensersatzrecht” in tort law doctrine.⁸²

The struggle to see good the interests of the injured party runs together with the emphasis placed on the reparative function of compensation.⁸³ The full value of liability in tort, however, does not lie merely in the reparation itself. The value also lies in the soul-searching that tort is exposed to. The question is raised why it operates with the limitations that it does. One kind of limitation has to do with the prioritisation of certain injured persons. When does this prioritisation occur (see 3.2.3. below), and why does the commendable orientation towards the interests of the injured party in this way suddenly differ to be stronger in certain connections as compared to others (see 3.2.3. below)?

3.2.2 The Priority to Personal Injury

3.2.2.1 Social and Humanitarian Viewpoints

Already Ivar Strahl, a prominent figure in the history of Swedish tort law, who in a bill in 1951⁸⁴ proposed a radical change of Swedish tort law,⁸⁵ drew

⁷⁸ See their contribution in *N.Y.U. L. Rev.* vol. 66 (1991), from p. 1263. Blum indignantly rejected O’Connell’s proposal for a product liability regardless of defect (note 76 above *op. cit.*) in the same manner in a review of the proposal in *U. Chi.L.Rev.* vol. 43 (1975), p. 218.

⁷⁹ See particularly at pp. 1267 and 1329 (“Notwithstanding its superficial attractiveness, however, across-the-board liability without defect will never happen because it can never happen”, at p. 1329).

⁸⁰ Another issue is that the insurance route works with a non-defect liability, such as the Swedish pharmaceutical product insurance does.

⁸¹ BGHZ 98, 212 = NJW 1987, 50.

⁸² D. Medicus, *Das Luxusargument im Schadensersatzrecht*, NJW 1989, from p. 1889, at p. 1889.

⁸³ See for example James, in note 66 above *op. loc.* Other examples: I. Strahl, *L’évolution de la responsabilité civile en Suède*. From : *Aspects nouveaux de la pensée juridique. Recueil d’études en hommage à Marc Ancel. Vol. I : Etudes de droit privé, de droit public et de droit comparé.* Paris 1965, from p. 215, at pp. 219 (“Il est en effet souhaitable que la victime d’un dommage à sa personne où a ses choses soit indemnisée, (...)”) and M. Keller, *Haftpflicht und Versicherung in der Wertordnung des technischen Zeitalters*. From : *Festgabe Oftinger*, in note 49 above *op. cit.*, from p. 111.

⁸⁴ SOU 1950:16. Förberedande utredning angående lagstiftning på skadeståndsrättens område.

⁸⁵ See B. W. Dufwa, *Responsabilité du fait des produits en droit suédois*, *Rev. intern. dr. comp.* 1977, from p. 525.

attention to the differences made between personal injury and damage to property from social and humanitarian points of view.⁸⁶ Although an intimation of this kind was reiterated in the Damages Act bill of 1972,⁸⁷ a more extensive differentiation in the regulatory system was not made between them.⁸⁸ That would have to wait until the Damages Act reforms in 1975, when social and humanitarian viewpoints gained more influence over legislative moves in the area of liability for personal injury.⁸⁹ The change has certainly been noted in the doctrine, but has not thus far led to any radical restructuring of tort law; cases of personal injury and property damage are still to a great extent treated like twins.⁹⁰

3.2.2.2 Contributory Negligence

As far as Swedish tort law is concerned, it was the rules on contributory negligence that came to give the first significant expression to the above-mentioned disparity. When the Damages Act was amended in 1975, the provisions dealing with contributory negligence made a difference between cases of personal injury on the one hand, and damage to property and pure economic loss on the other. Apportionment of damages will not generally come into question following personal injury caused by simple negligence, and not even necessarily (“may”) in cases of gross negligence or intent. With gross negligence is meant only extremely serious cases of negligence: the *travaux préparatoires* stipulate that the victim’s action has to witness a considerable lack of regard or nonchalans putting himself at an appreciable risk, or illustrate a

⁸⁶ One can already note here and there in the early Swedish tort law debate that personal injuries was considered as serious matters from a legal-compensatory point of view. See *e.g.* B. E. Drakenberg, *Ett spörsmål om avsägelse av rätt till skadestånd*, SvJT 1916, from p. 341, at p. 342 (where the author contends that personal injuries cannot reasonably be dealt with worse than damage to property in the context). The development as far as compensation for personal injuries is concerned is depicted from a dogmatic point of view in F. D. Busnelli, *Der Personenschaden – Eine rechtsvergleichende Untersuchung zur dogmatischen Einordnung*, VersR 1987, from p. 952.

⁸⁷ See *e.g.* prop. 1972:5, at p. 131.

⁸⁸ In certain areas the change may nevertheless have pushed through already earlier. In a public investigation conducted in 1966 by B. W. Dufwa, the author of the present account recommended that a distinction be made between harms to persons and to property when it comes to compensating individuals injured in accidents in traffic caused by elk or deer. No distinction was between the two in the special compensatory system existing for such compensation. The recommendation was that personal injuries, as the more important to compensate for, were to be the only harms compensated for by the special system. The new compensatory system also came to be shaped according to this model.

⁸⁹ Cf. prop. 1975:12, at p. 131.

⁹⁰ According to Kleineman, in note 41 above *op. cit.*, at p. 2, the doctrine’s interest should have “concentrated on personal injuries and, to a certain degree, damage to property” at an earlier stage. This outweighing at the expense of damage to property was probably exaggerated. Personal injuries and damage to property have traditionally been put on equal footing to such a degree that the terminology could have been called into question; this it also was, both *de lege ferenda* and *de lege lata*, on an international level in Dufwa, *Rev. intern. dr. comp.* 1977 (*op. cit.*), at p. 528, note 12.

clear indifference as to his own life or good health. It almost becomes a question of cases fleeting on the boundary of intentional assistance.

There is one exception to the above, arising in cases where personal injury has led to death. Damages awarded to the deceased's family for loss of the family bread-winner used to be adjustable on the grounds that the deceased through his or her negligence contributed to their own death. The preparatory works to the Damages Act reforms of 1975 gave expression to the fact that this principle often led to objectionable results.⁹¹ For this reason, apportionment of damages nowadays will only be occasioned upon the deceased having committed suicide.

The Damages Act amendments of 1975 took place shortly after the replenishment of the Swedish traffic accident law. The Traffic Damages Act 1975 came to incorporate essentially the same rules concerning the injured party's contributory negligence as the Damages Act. A few years later, the French traffic accident legislation would come to develop along these lines to the benefit of the injured person. Typically enough it was here, however, the French courts that started to widen the road.

In 1977 a car belonging to a Mr. Desmares knocked down Mr and Mrs Charles. Desmares' third party liability insurer claimed that the Charles's had acted negligently and that therefore no compensation whatsoever was to be made out. According to French custom, Desmares had a liability according to article 1384, the first paragraph in the Code civil (liability founded on control ["garde"]).

Three different outcomes were possible following contributory negligence:

- 1) A court could find for full liability.
- 2) Liability could fall away where the contributory negligence was found to be *force majeure* ("une cause étrangère imprévisible et irrésistible", essentially meaning that the victim's action had been completely unexpected).
- 3) Liability could be shared where the injured party had committed a fault, as long as the contributory negligence could not be characterised as *force majeure*.

The court held at first instance that Desmares was not liable at all. This decision was, however, reversed following an appeal, and Desmares was found to be liable in full, subsequently upheld by the Cour de Cassation. The *arrêt Desmares*, pronounced in 1982, laid down that contributory negligence only would lead to reduced liability according to article 1384, the first paragraph in the Code civil if it involved *force majeure*. A normal culpable conduct would not suffice, and neither would, as in this case, gross negligence. Although the judgment referred to personal injury inflicted in traffic, no limitations in this regard were stipulated. The decision of the Court unleashed an enormous dispute within the judiciary, with many cours d'appel refusing to accept it. The Cour de Cassation, however, stood firm- immovable. The legislature came to accept, at least in principle, the interpretation of contributory negligence given by the Court.

The Swedish legal rules concerning contributory negligence may seem to go far in the way of goodwill towards the victim and his or her survivors following personal injury. It is by no means necessary to apportion damages, even in cases of suicide – it is simply an option. The Swedish Supreme Court did not make use of this possibility either in NJA 1981, p. 920, a case where survivors succeeded

⁹¹ See prop. 1975:12, at p. 134.

in getting full traffic injury compensation after suicide of the driver. This compensation was to a large extent based on rules and principles of tort, and following this case an award of full compensation to survivors even in other cases than those involving traffic injury cannot be ruled out where the injured person has intentionally taken his own life. With the award of full compensation to the surviving family of a suicide, the rules of tort have shifted towards the perspective of social insurance. Even if this kind of displacement is possible in Sweden, it is not a given that the legislature and judiciary in other countries would find it a natural route to follow in developing the survivor's protective measures. Roscoe Pound said in 1950 that a judge had proposed that the causal link should no longer be a condition of liability in tort. According to Pound, this way of acting in reality resulted to the employment of the same methods as Robin Hood in order to arrive at the rescue of the injured party.⁹²

The evolution in America of a more considerate disposition vis-à-vis injured parties has progressed with remarkable speed since the middle of the 20th century. It is hardly likely, however, that we will see the adoption of Swedish modelled compensation for surviving families of suicide victims on the other side of the Atlantic in the near future.

An argument in this connection has been raised in the legal-political discussion based on a comparison between the situation of the wrongdoer and the plight of the injured party. The reasoning goes that third party liability insurance covers compensation, even where the wrongdoer is guilty of negligence. The injured party on the other hand will suffer a reduction in the amount of compensation upon a finding of contributory negligence.⁹³ The idea is that upon fault by the wrongdoer, the coffers will open; fault conduct on the part of the injured party would however trigger the coffers' closing mechanism. The argument is that this system is unfair, and that it therefore must be changed.

The tortfeasor and the victim are in this way placed in a parallel position, after which one can see the difference in their treatment under the law; this is to the disadvantage of the victim. As even the injured party can protect himself by acquiring insurance, the aim of the comparison can also be seen as proving a

⁹² Pound, *Law in the Service State: Freedom versus Equality*, A.B.A. J. vol. 36 (1950), from pp. 977 and 1050, at p. 981: "Suppose X decides to commit suicide and stands at the corner waiting for a bus or heavy truck as the chosen agent of self-destruction. When one comes along he throws himself beneath its wheels and is killed. If causation is eliminated and fault too, should not the transportation or trucking company, which can pay a judgment, repair the loss to the widow and children? Thus we achieve high humanitarian purposes by the easy method of using the involuntary Good Samaritan as the Greek playwright used the god from the machine. Looking at realities, however, it is the method of Robin Hood or of Lord Bramwell's pickpocket who went to the charity sermon and was so moved by the preacher's eloquence that he picked the pockets of everyone in reach and put the contents in the plate".

⁹³ The reasoning may be said to be one of the guiding themes in A. Tunc, *La sécurité routière. Esquisse d'une loi sur les accidents de la circulation*. Paris 1966; see also Strahl, SvJT 1967, from p. 638, at p. 640. See also even R. E. Keeton & J. O'Connell, *Basic Protection for the Traffic Victim. A Blueprint for Reforming Automobile Insurance*. Boston, Toronto 1965, at p. 253. One cannot naturally finger the conditions of liability just because liability insurance is present; reluctance in this regard reflects the classic approach (cf. e.g. E. Alten, *Våre domstolars stilling til spørsmål om objektivt erstatningsansvar utenfor kontraktsforhold*, TFR 1950, from p. 325, at p. 333).

difference between third party liability insurance and the injured party's insurance. The former is by far more common than the latter, and this may be considered to be unfair in itself.⁹⁴

The rules on contributory negligence can be shaped with regard to third party liability insurance. The legislature could have provided in the 1975 reforms that the injured party should obtain full compensation in cases of mere contributory negligence, under condition that third party liability insurance existed. This did not, however, come to pass. To the contrary, whether third party liability insurance exists or not is insignificant to the application of the rules of contributory negligence.

Apportionment will therefore not usually occur in cases of personal injury involving contributory negligence. However, this situation again gives rise to an imbalance between the parties: the wrongdoer personally is forced to compensate in full for harm caused, even though the injured party has contributed more to the harm caused than the former. During the preparatory work, two members of the Council on Legislation protested against this system.⁹⁵ They stressed the point that tort legislation was "aimed at a regulatory system that as far as possible and without exception leads to a socially acceptable result. Such a social way of looking at things would obviously come to a stop if limited solely to one side of the case; for example to the victim."⁹⁶ They emphasized that, while the proposed rules otherwise to a large extent were characterised by the will to try and prevent clearly unreasonable and unjust results in cases, the rules on contributory negligence as designed would nonetheless lead to just those sort of problems. They pointed unmercifully to those cases where the tortfeasor was a private person without third party liability insurance.⁹⁷

⁹⁴ See also prop. 1975:12, at p. 131, where it was stated concerning the previous application of the rules on contributory negligence: "If full compensation is made out, it will often lead to an acceptable spreading of the risk as the damages in most cases are covered by liability insurance. One cannot reasonably count on the victims having protected themselves to a corresponding degree through voluntary sickness and accident insurance etc. (...). From social and humanitarian viewpoints, it cannot be considered reasonable that the individual falling foul to an injury in this way should be suffering for all eternity by an incidental carelessness or suchlike".

⁹⁵ See NJA II 1975, at p. 560.

⁹⁶ NJA II 1975, at p. 560.

⁹⁷ NJA II 1975, at p. 560: "These cases are probably not yet so few as to be left aside. If, for example, two individuals contribute to an accident and one of them escapes without injury, then, according to the proposal, he would be liable to compensate fully towards the other – even if the other one to a large extent was the one who caused the accident. And it is not certain that the accident would hit the less well-placed of the two. The individual who in his daily work holds the position of an employee and is thereby served by a narrow rule of apportionment for the occurrence of damage caused unto him, may in another situation be the one who causes the harm, and in that case have the reverse interest. A narrow rule of apportionment may lead to a skewed damage regulation, even if both come to harm in the imagined case. According to the proposed rule, each of them will then be separately liable to compensate the other's damage, but shall not have to sustain any part of their own damage whatsoever, regardless of whether any liability or accident insurance is present on side and not on the other. One should not look away from when accidents occur in everyday situations that not only purely economic factors belong to the picture, but also even psychological

The attitude of these two members presupposes that we look at tort in a wider perspective. Their protestations were, however, in vain. One could say they were drowned out by the almost hysterical calls for questions of liability in tort to be seen through the eyes of the victim to the furthest possible extent. The reporting Minister without explanation stated that he had found no reason to change his previous view on the issue;⁹⁸ The Swedish Trade Union Confederation (LO) driving force in this connection has been noted in the doctrine.⁹⁹ With the legislation on contributory negligence in 1975 the orientation of the interest from the wrongdoer against the victim can be said to have reached its pinnacle in Sweden.

It is not excluded that the rules on contributory negligence in personal injury cases have begun to swing in a more general direction as of late. At any rate, the understanding about what is reasonable has followed particular lines in one central area of tort, namely that of product liability. Here we are dealing with an issue of international influence. According to the EC Directive on Product Liability, apportionment of compensation for personal injury can be made even in case of mere contributory negligence on the part of the injured party. The Government Bill 1990/91:197 on the Product Damage Act implied that the provisions of the Damages Act should be applicable in this regard. This was, however, opposed by the Swedish Parliament that made reference to the content of the Directive.¹⁰⁰ The Product Liability Act was provided with a new Section 10, according to which apportionments can be made even in cases of mere contributory negligence of the injured party. The bill that preceded this amendment set forth a number of arguments in favour of the alteration, which were in part of a very general nature.¹⁰¹ When the matter had come before the Parliament, also the possibility of altering the provisions of the Damages Act's rules on contributory negligence concerning personal injury to allow apportionment in cases of mere contributory negligence was discussed. In accordance with the Committee's observation on this point¹⁰², the bill noted that the question would have to be seen "in a wider connection"; it could not be brought up within the framework of the current legislative matter.¹⁰³

factors – purely human regards – have a role to play. The individual who comes to harm will of course be the centre of attention. But for many it is not equal, whether or not full liability in tort is imposed on him so that he bears the full burden of responsibility for the accident himself, even if it was caused primarily by others."

⁹⁸ See NJA II 1975, at p. 562.

⁹⁹ So by B. Bengtsson in his article *Om civilrättens splittring*. From: Festskrift till Kurt Grönfors, from p. 29 ff, at p. 35, note 12.

¹⁰⁰ The Swedish Parliament told the Government what the Parliamentary Standing Committee on Civil-Law Legislation had noted on the issue; see 1991/1992:LU14, at p. 20. Apart from points of view of principle, it was also stated that Swedish companies would have to be allowed to compete with other EC companies on equal terms.

¹⁰¹ Prop. 1992/1993:38, at p. 14.

¹⁰² 1991/1992:LU14, at p. 14.

¹⁰³ Prop. 1992/1993:38, at p. 16.

3.2.3 Priority to Only Certain Personal Injury Cases

How can it be so much easier to obtain compensation for a traffic injury than for an injury caused by a slip in the bathtub? This question is painful.¹⁰⁴ Its significance has been discussed in the doctrine over a long period of time.¹⁰⁵ It is commonly known as the “bathtub-argument”.¹⁰⁶ The issue is of course not concerned solely with traffic injuries and bathroom folly. “Le massacre ne se produit pas que sur les routes, mais sur la montagne, en bateau de plaisance, sur les plages, les champs de ski, dans les magasins, restaurants, immeubles et même les foyers familiaux, par asphyxie, dans les ascenseurs.”¹⁰⁷ And after all the question can also be framed in a way that focuses on the wrongdoer: why is he favoured in certain situations but not in others?¹⁰⁸

The bathtub-argument is of relevance in two connections. Firstly, concerning the conditions of liability, and secondly as regards the calculation of compensation. In Sweden, the argument is weaker in the latter connection than in relation to the former. Under the special insurance schemes, established to the benefit of injured persons, compensation is calculated in essentially the same way as for damages. As the same levels are therefore applicable, unfairness is avoided. In relation to calculation methods and compensation, the bathtub-argument is for ex. more applicable in Quebec, since the Criminal Compensation Injury Scheme in this country does not, and in contrast to its Swedish counterpart, provide for any compensation concerning intangible harms.¹⁰⁹

104 On prioritisation as a general legal-political problem, see E. von Hippel, *Grundfragen der Rechtspolitik*, JZ 1984, from p. 953, at p. 959, with further reference to P. Noll (“Wenn aber der eine Zweck nur auf Kosten des anderen verwirklicht werden kann, treten in der Praxis *Kollisionen zwischen Werten* auf, die theoretisch durchaus miteinander vertraglich sind”, Noll, *Gesetzgebungslehre*. München 1973, at p. 137).

105 See thus already J. Smith, *Sequel to Workmen’s Compensation Acts*, Harv. L. Rev. vol. XXVII (1913-1914), from p. 235 and 344, at p. 367: “We have now attempted to show that, if justice to workmen requires such an enactment, then justice to certain persons other than workmen must also require similar legislation for their benefit; in other words, that the benefit of legislation on this basic principle cannot justly be confined to workmen”.

106 Cf. C. M. Roos, *Personskadeersättning i arbetslivets försäkringar – idéer och uppslag*, SvJT 1991, from p. 143, at p. 145, and D. Güllemann, *Der Ausgleich von Verkehrsunfällen – ein ungelöstes Problem*, ZRP 1974, from p. 35, at p. 41.

107 A. Toulemon & J. Moore, *A propos de la responsabilité civile. Progrès où régression*, Gaz. Pal. 1965. I, Doctr., from p. 111, at p. 111.

108 Cf. C. Blaevoet, *Des bouteilles lancées du train ... et de la responsabilité*, Gaz. Pal. 1965. I, Doctr., from p. 127, at p. 128: “Et enfin, supprimer la responsabilité individuelle pour les auteurs d’accidents de la circulation et la maintenir pour les auteurs de dommages dans les autres domaines, n’est-ce pas rendre la justice boiteuse et instituer deux poids, deux mesures? Et-ce ainsi qu’on entend la logique et l’égalité en France?”.

109 See M. Goudreau, *Le problème de la disparité des indemnités pour prejudice corporel accordées par le législateur québécois*, R.G.D. vol. 18 (1987), from p. 147, at p. 154. Different to traffic injuries and the aims here appear to have been avoiding a system according to which the injured parties try to obtain compensation from other sources, see at p. 162. A complete parallel between the rules on traffic injuries and what applies according to application of the law as far as general tort law is concerned, does not exist, see J. de Montigny, *La réforme de l’assurance automobile et la sécurité routière au Québec*, R.G.D. vol. 18 (1987), from p. 185, at p. 191.

The full force of the argument can, however, be felt in connection with the conditions of liability, both in Sweden and in most other countries. The Swedish system of compensation bears witness to numerous examples of injustice in this regard. One such example is the small group of injured workers who are unable to obtain any compensation whatsoever through the industrial injuries insurance (“trygghetsförsäkringen”) as their employer has not joined a collective agreement.

The bathtub argument has been responded to in different ways.¹¹⁰ It has been argued that in relation to traffic injuries, tumbles in the tub are less common, easier to simulate and less foreseeable, and that this therefore gives rise to a more reluctant attitude towards compensatory claims.¹¹¹ The question has also been put whether bathtub slips are a societal problem at all.¹¹² A more common line taken has nevertheless focussed on the nature of the traffic injury. The famous English Parliamentary Commission led by Lord Pearson examined the entire issue of personal injury compensation in 1978, the final report of which can be said to have resigned to the bathtub argument.¹¹³ The report points out four factors that serve to justify the special place held by traffic injury cases:

110 It is worth noting that the argument is not employed solely by those wanting all individuals to have the same possibility of obtaining full compensation. Even those that wish to retain the present arrangement make reference to the argument; they believe that the state of affairs today cannot be changed, and that the argument therefore contains an inescapable truth. Cf. A. Linden, *Automobile Accident Compensation in Ontario – a System in Transition (Comment)*, Am. J. Comp. vol. 15 (1966-1967), from p. 301, at p. 311 (“One would have more sympathy with these skeptics if they proceeded to propose equal compensation for all, but their purpose is not to be constructive.”).

111 See A. F. Conard and others, *Automobile accident costs and payments: Studies in the economics of injury reparation*. Ann Arbor, Michigan 1964, at p. 48: “One reason is that the volume of automobile litigation shows that there is a sense that justice demands reparation to an extent that does not exist with regard to kitchen accidents or boating accidents. Another reason is that demands for automobile injury reparation are crowding the courts and distorting the practice of law, so that some effort should be made to siphon off the demand for reparation. A third reason is that automobile accidents are unlikely to be imagined or fabricated, because they normally occur in public places and are subject to a system of police reporting. A fourth reason is that enough is known about automobile accidents so that their frequency can be predicted and costs of the program estimated. Finally, there is a good possibility of paying for rehabilitation of victims by some sort of tax on automobiles, which are already registered and serialized and, therefore, amenable to taxation”.

112 Marx, Ohio St.L. J. vol. 15 (1954) (in note 24 above *op. cit. Reply to...*), at p. 148: “A fall in a bathtub is an isolated event. It is not a social problem. It is not a product of a fast moving society which leaves thousands of victims without means of support or sustenance. The automobile accident victim, on the other hand, is a very marked social problem, both because of his number and because of the source of his injury”.

113 The Commission thus wanted to break off certain types of injuries from the others with an aim to treating them in a manner more beneficial for the injured party; this applied not least to the traffic injuries (one exception was nevertheless the burden of proof, see Royal Commission on Civil Liability and Compensation for Personal Injury. Chairman: Lord Pearson. *Report. Presented to Parliament by Command of Her Majesty March 1978*. London 1978. Vol. 1 (Pearson Report 1) no. 1073).

They are common, public— meaning not limited only to a specific group of injured person- serious, and occur everyday.¹¹⁴

These viewpoints may seem to be too “airy”. They do, however, answer to the realities of a world in which whatever regulatory system is applied will seldom prove a flawless choice.

In Quebec, the bathtub argument has been met with reference made to the principles upon which the special compensatory arrangements are built. The arrangement covering criminal injury is based on “la solidarité sociale ou la justice distributive”.¹¹⁵ In such a case nothing forces the legislature to ensure that full compensation is made out.¹¹⁶ The situation is different where compensation is based on “la théorie de risque”, which according to many would include compensation covering occupational and traffic injuries.¹¹⁷ A rather arbitrary division of various bases for liability thus governs the end result.

The system that has therefore come to apply in Quebec— “le phénomène étatique”— is explained from a practical point of view as being that the legislature will only intervene when public opinion demands such action.¹¹⁸ This has been criticised. An all-embracing and comprehensive view on the principle of compensation for personal injury has been sought¹¹⁹- just as in Sweden.¹²⁰

Many refuse to accept a system of compensation that means that the injured party will obtain full compensation for certain personal injuries but not for all types of personal injuries.¹²¹ These calls have not yet become silent.¹²² The international storm of protest has been considerable. The difficult questions put forward echo and resound, intensifying the unrelenting power and weight of the bathtub argument.¹²³

114 See Pearson Report 1, *op. loc.* at p. 212.

115 Goudreau, in note 109 above *op. cit.*, at p. 166.

116 *Op. loc.*

117 *Op. cit.*, at p. 167.

118 *Op. cit.*, at p. 169.

119 Such as in *op. cit.*, at p. 169. (The attitude of the legislature is said to risk leading him to “favoriser indûment certaines victimes au détriment d’autres peu ou pas indemnisées. Une politique générale, ou du moins une vision générale, de l’indemnisation étatique permettrait d’éviter ce danger”).

120 Such as by Dufwa, SvJT 1979 (in note 17 above *op. cit.*), p. 483.

121 On early American protest emanated from Marc Franklin: “I see little reason to single out automobile victims for special treatment. I do not see why, as an initial proposition, today’s law should care *how* a limb was broken, whether by an intentional wrongdoer, a negligent automobile driver, a nonnegligent driver, a wall toppled by an earthquake or a fall in the bathtub”. In *Replacing the Negligence Lottery: Compensation and Selective Reimbursement*, Va. L. Rev. vol. 53 (1967), from p. 774, at p. 777.

122 More randomly we can refer from the debate in recent years to, for example, Malkin, in note 34 above *op. cit.*: “Different treatment arising from *ad hoc* compensation system is a reality of Australian life. Aside from questioning the desirability of this state of affairs, it is worthwhile considering why it exists; that is, why have particular victims been singled out for preferential care, whereas others are not so fortunate? Further, *how* is this result justified? Is it sensible to have a society where one wants to identify and be treated like Carol, rather than Irene? What has Carol done to deserve special treatment?”.

123 Cf. A. Tunc, *Machine et protection de l’homme*. From: Festgabe Oftinger, in note 49 above *op. cit.*, at p. 320: “Il faut donc se résigner, semble-t-il, à ce que les victimes d’accidents de

3.2.4 The Prioritisation of Only Certain Damage to Property: Consumer Protection

One part of Swedish tort law may be said to have developed so that it today makes a clear difference between damage to property inflicted upon consumers and damage to property in general. This is the situation as regards the rules on product liability.¹²⁴ The pattern followed is the same in many other countries, especially other EU Member States; tortious liability for harm caused by defect products makes up an important part of consumer protection on the whole.¹²⁵ Furthermore, the general tortious rules may have developed making room for regard to be had to the circumstances of consumers.¹²⁶ This applies for example in relation to the Swedish rule on economic apportionment, making it possible for the judge to and –as far as joint and several torts are concerned– the application of a test of reasonableness in accordance with the general rule of recourse. Aspects of consumer protection come to light even in the *de lege ferenda* discussion.¹²⁷

In all of these cases there is a prioritisation of one particular type of damage to property, namely that attached to a specific class of sufferer: the consumer as opposed to companies. There does not appear to be any corresponding prioritisation on the injurer's side; one is no more sympathetic to the plight of the wrongdoer simply because he is a consumer rather than some other form of wrongdoer.¹²⁸ This precedence attached to harm caused to consumer property as opposed to all other damage to property – that has brought the tortious and

la circulation soient mieux indemnisées que les autres... Mais il faut rechercher l'extension commune de la responsabilité et de l'assurance pour mieux assurer l'indemnisation des dommages accidentels”.

¹²⁴ See therefore Section 31 (4) of the Consumer Services Act, and Section 10 of the Product Liability Act. From case law, see NJA 1983, p. 118: For a private person to lose their position as a consumer in the context, it may be sufficient that his conduct likens that of a company; a person incurring losses through his horse being injured was certainly in this case considered to have kept the horse as part of his hobby. But the same legal principles were nevertheless applied as in an earlier case between disputing businessmen.

¹²⁵ See e.g. the testimonies provided in O. L. Patrell, *La responsabilité civile produits*, R.G.A.T. 1980, from p. 445, at p. 446; E. A. Kramer, *Konsumentenschutz als neue Dimension des Privat- und Wettbewerbsrechts*, ZSR 1979, from p. 49, p. 75; J. Calais-Auloy, *Droit de la consommation*, 3rd ed. Paris 1992, at p. 64; and B. W. Harvey & D. L. Perry, *The Law of Consumer Protection and Fair Trading*, 3rd ed. London 1987, at p. 117.

¹²⁶ Concerning the tendency of Swedish courts to attach importance to consumer views in tortious cases, see B. Bengtsson, *Konsumentskyddsprincipen och domstolarna*. From: Festschrift till Lars Welamson. Stockholm 1988, p. 26.

¹²⁷ When it comes to product liability, Marc Fallon, a Belgian legal theorist, has in particular stressed the value of a European consumer direction. See his work *Les accidents de la consommation et le droit. La responsabilité du fait des produits en question: droit comparé, droit des conflits de lois avec l'aide de la méthode expérimentale*. Brussels 1982, from p. 141.

¹²⁸ By virtue of Chapter 3, Section 1 of the Damages Act, private persons came to encompass the same employers' liability as companies. Cf. regarding insurance law the Insurance Law Committee's thoughts in *Skadeförsäkringslag* (SOU 1989:88), according to which small companies in principle would be put on an equal footing with consumers.

insurance regulatory systems closer together¹²⁹- would appear according to the doctrine to cause less offence than the prioritisation of certain personal injuries over others.

3.2.5 Multiple Tortfeasors

3.2.5.1 Conditions of Liability

The development set out above, signifying a shift of focus from the wrongdoer towards the injured party, naturally applies to cases of both singular as well as multiple tortfeasors. Numerous examples exist of the improved possibility to come to the rescue of the sufferer as developed during the 1900's in cases of multiple tortfeasors. This period saw the evolution of an increasingly comprehensive liability for employers, eventually also other types of liability for acts by other persons. Special rules on evidence, developed for situations where there are difficulties to establish who of many tortfeasors caused the damage, illustrate that a right to compensation can work. Like ripples in water the circle of liable persons grew to such a degree that we can truly speak of a spreading of damages.

In general, the possibility for the injured party to obtain compensation is greater in cases of multiple tortfeasors than in those involving single wrongdoers. The struggle to look after the interests of the injured party can in the international debate sometimes go as far as attempting to "transform" a single case into a multiple tortfeasor case in a regulatory respect. The line of reasoning followed by the Swiss legal scholar Fischer in relation to damages for nervous shock belongs to this school of thought. The possibilities for third parties to obtain damages are, as we know, limited; a fact not only prevalent in the Swiss and Swedish legal orders but also in many others.¹³⁰ By following the line of argumentation by Fischer, one would now regard the situation as if both the wrongdoer (A) and the directly injured party (B) are liable in tort for the psychiatric harm caused to X; thus not merely looking at A.¹³¹ The whole aim of this operation is to come to the rescue of X. In considering B as a tortfeasor in this situation, the harm is no longer caused indirectly by A against X but rather directly and therefore gives rise compensation. The ultimate responsibility for payment will still not come to rest on B finally, as we can assume that recourse liability will normally lie solely with A.

This argumentation is based on an artificial construction. It presumes that B can be considered as a tortfeasor. It is not therefore appropriate to create

¹²⁹ See the great Swedish triumph, from an international point of view: The Consumer Insurance Act. The consumer idea is nevertheless on the march throughout Europe within the field of insurance. See for Germany, E. von Hippel, *Fortschritte beim Verbraucherschutz im Versicherungswesen*, JZ 1990, from p. 730; for France, Y. Lambert--Faivre, *Droit des assurances*, 8th ed. Paris 1992 no's 106, 117 and 195.

¹³⁰ See the overview in B. W. Dufwa, *Book Review*, SvJT 1986, from p. 39, at p. 44.

¹³¹ W. Fischer, *Ausservertragliche Haftung für Schockschäden Dritter. Ein Beitrag zur dogmatischen Analyse der sog. Fernwirkungsschäden*. Zürich 1988, at p. 59.

multiple tortfeasor cases out of truly singular cases. The better way to make A liable in tort for psychiatric harm caused to X would be to widen the special rules covering such harm.

3.2.5.2 The Principle of Joint and Several Liability

The struggle between the viewpoint that involves the act of the tortfeasor, and the viewpoint that is directed to the injured party is clearly exposed with regard to the principle of joint and several liability. This principle can in some cases be understood as meaning that each of the injurers are individually responsible for causing all of the damage. It can also be seen, however, as a question of security for the injured party. It is in this latter understanding that modern tort law has laid most weight. It has been said that the victim is a “pasha”,¹³² who can demand payment to be made from whichever of the liable parties he so chooses.

Regard to the victim in this way does not, however, provide us with the only argument put forward in defence of this principle. Legal-technical viewpoints can also be employed to this end. An ideal application of the law would see legal-political considerations complementing the more legal-technical opinions (*Cf.* 1.2 above).

3.2.5.3 Recourse

Tortfeasors have an interest in a thoroughly worked out recourse apportionment that takes account of their demands of fairness. The injured party on his side has no interest in how the apportionment takes place; the most important thing is being able to take advantage of the principle of joint and several liability.

This viewpoint is, however, based on a simplification. Even the injured party should have an interest in a satisfactory recourse division, as wrongdoers may be more inclined to make payments if they know that a just apportionment awaits.

A shift of focus from the tortfeasor towards the injured party is more difficult to discern as far as recourse is concerned.

3.3 *The Functions of Damages*

The focus of the legal-political discussion has come to rest on what purpose, what function, damages in tort have. With regard to these functions, we shall look below at: (1) Compensation; (2)-(4) Prevention; (5) Distribution; (6) Freedom- Security; (7) The Ombudsman; and (8) Justice, Sense of Justice and Morality.

¹³² According to the German legal theorist, P. von Heck (1858-1943), the injured party received a “Paschastellung”; see C. Hirsch, *Allgemeines Schuldrecht. Eine Einführung anhand von Rechtsprechungsfällen und Entscheidungsdiagrammen*. Köln, Berlin, Bonn, München 1990, no. 1061 and *cf.* Palandt, *Bürgerliches Gesetzbuch*. 52th ed. München, Berlin 1993, Section 421 Anm. 1 (Heinrichs).

These functions can conflict with each other.¹³³ They can also overlap. They may above all be difficult to grasp. It may be that they have been afforded too great significance in the discussion; one should perhaps treat tort more the way it is as you find it.¹³⁴ Such considerations do not, however, prevent an assessment of the individual functions of damages.

3.3.1 Compensation

3.3.1.1 General

In older times the primary function of damages may have coincided with the penalties imposed. This is still the case in the international community concerning certain types of damages (see below). Generally speaking, however, it has become clear nowadays that the real purpose of damages is to provide for compensation. This purpose has also come to the fore in the legal-political discussion in Sweden. The legislature has clearly underlined its importance, and this same weight has been noted in legal literature.

This development can also be discerned in other countries¹³⁵ – the compensation (l'indemnisation; das Ausgleich; ersättningen) has become the obvious legal-political starting point.¹³⁶ The impact does, however, vary somewhat from country to country. This may be due to the prevailing compensatory conditions in a given country, but this is not always the case. In America, where the National Security Insurance system is poorly developed, the compensatory function of damages has an extremely important role to play in personal injury cases.¹³⁷ The Social Insurance system in England is, on the other hand, rather well developed. According to Tunc, English lawyers take it almost as a given that the sole purpose of damages is to compensate.¹³⁸

¹³³ The question is touched upon especially by M. J. Trebilcock, *The Social Insurance-Deterrence Dilemma of Modern North American Tort Law: A Canadian Perspective on the Liability Insurance Crisis*, San Diego L. Rev. vol. 24 (1987), from p. 929.

¹³⁴ See E. J. Weinrib, *Understanding Tort Law*, Val. U.L. Rev. vol. 23 (1989), from p. 485. Tort law, according to Weinrib, is like love. You cannot understand it as an instrument for achieving a minimisation of accident costs. "Explaining love in terms of ulterior ends is necessarily a mistake, because a loving relationship has no ulterior end. Love is its own end", at p. 526. This reasoning is, however, criticised in G. H. L. Fridman, *Torts*. London 1990, at p. 11.

¹³⁵ See for example concerning USA: Sugarman, in note 21 above *op. cit.* ("Over the past three decades, it has become increasingly popular to view victim compensation as the central purpose of tort law", at p. 35).

¹³⁶ See regarding Germany: G. Brüggemeier, *Produkthaftung und Produktsicherheit*, ZHR Bd. 152 (1988), from p. 511, at p. 513; M. Adams, *Ökonomische Analyse der Gefährdungs- und Verschuldenshaftung*. Heidelberg 1985, at p. 8; Schäfer, in note 29 above *op. cit.*, p. 160.

¹³⁷ See Sugarman, *op. cit.*, pp. 35-36 ("Because neither Congress nor our state legislatures have adopted a comprehensive social insurance scheme, personal injury law has been viewed in some quarters as a progressive alternative", at p. 35). Here it is also emphasised that it is not only the legislatures that work in this direction. Even the courts can do so.

¹³⁸ A. Tunc, *La responsabilité civile*. 2nd ed. Paris 1989, at p. 142. In Current Legal Probs. vol. 4 (1951), p. 137, Glanville Williams also stressed that compensation is the only defensible

The ability of tort law to achieve the goal of compensating for harm caused has, however, been attacked from several viewpoints. One objection is based on the tortious regulatory system in principle not allowing compensation for harm resulting from accidents without fault. The fault principle was obviously criticized from this point of view by the Minister of Justice in the *travaux préparatoires* of the Damages Act and the criticism sometimes run along the same lines in the international tort law literature.¹³⁹

The blame laid on tort in modern times has in many regards been well deserved. Some of the rules have been in need of reform, and the reproach has contributed to moves in this direction. But where criticism has been based on tort law's lacking ability to compensate the injured party in full, it often bears a certain trace of sententiousness and injustice. Tort law has never pretended to be able to provide full compensation to all sufferers.¹⁴⁰

Damages have an obvious reparative function, and often it is important to emphasize this point. Attempting to transfer this function to tort law as a system of norms is, however, entirely inappropriate and unsuitable. The aim of tort is not to provide full compensation to all sufferers. Its task is instead to separate unacceptable conduct from that acceptable in a democratic society. Herein lies the true purpose of the tortious rules.¹⁴¹

More apt is the critique arguing that in reality damages are seldom made out, owing to the difficulties sufferers face in satisfying the burden of proof relating

aim of tort. Cane claims that the compensatory function of damages is the primary function (see Cane, in note 73 above *op. cit.*, at p. 487). Tunc's statement may not be strained nonetheless. It is quite clear that English lawyers in general understand even other functions of tort than the compensatory one. See especially Cane, *op. cit.*, at p. 484 ("But loss prevention is one of the aims of tort law", at p. 488). See further the discussion in J. W. Salmond, *The Principles of Civil Liability*. From: *Essays in Jurisprudence and Legal History*. London 1891, from p. 123, at p. 125, where the author in contrast to others drives the point that tort's compensatory function is the primary; the other understanding was that the damages amounted to a punishment.

¹³⁹ See e.g. Tunc, *loc. cit.*, and Sugarman, *op. cit.*, at p. 37.

¹⁴⁰ Harry Kalven Jr., in an article on no-fault insurance in the field of traffic injuries, noted: "[B]y definition the common law did not intend to compensate all victims; whether for good or for ill, as a matter of principle, it did not compensate all victims of auto accidents. I stress this obvious point simply because in so many discussions it is announced with an air of discovery that the current system does not achieve full compensation for everyone. That it does not do so is not a sign that it is not working, but rather an indication that it is working according to principle, albeit a principle we might wish to debate". *A Schema of Alternatives to the Present Auto Accident Tort System*, Conn. L. Rev. vol. 1 (1968), from p. 33, at p. 34. See also J. C. Love, *Punishment and Deterrence: A Comparative Study of Tort Liability For Punitive Damages Under No-Fault Compensation Legislation*, U.C.D. L. Rev. vol. 16 (1983), from p. 231, at p. 232. Little's criticism of the ideas of Sugarman also takes the same direction: "If a comprehensive compensation system is what one is looking for, the law of torts is a crazy model to emulate... It is historically, functionally and culturally wrong to think of tort as a comprehensive compensation system", J. W. Little, *Up with Torts*, San Diego L. Rev. vol. 24 (1987), from p. 861, at p. 862.

¹⁴¹ See Little, *op. cit.*, at p. 865: "...compensation is not the goal of tort law, but merely is the most practical remedial expression yet discovered. Nevertheless, the remedy is subordinate to the true operational goal of the law of torts, which remains to serve as a civil law method of truncating unacceptable extremes of human behaviour from the remainder that must be left unfettered in a democratic free society."

to the causal link, culpa or other prerequisite condition.¹⁴² It is certainly unfortunate if certain rules are put in place that can rarely be satisfied, but in this regard there is also always the possibility to change those rules.

One serious objection concerning the ability of the tortious rules to satisfy its compensatory function may exist due to the difficult task of calculating the degree of harm.¹⁴³ It may be so difficult to establish the extent and degree of harm in cases of intangible property that the Judge ultimately remains in doubt or gives up entirely; compensation would then only be made out for a smaller, more ascertainable part of the accepted harm caused.

Everything is exactly what you decide to make out of it, though. It can be extraordinarily harsh to force someone to establish what amounts to reasonable compensation for damage caused to intangible property. It is nonetheless possible to arrive at a decision. And difficult judgments are not the exclusive problem of tort law alone. It should also be noted here that a decision on the size of the award of damages can be avoided altogether by awarding a standard amount.

3.3.1.2 Multiple Tortfeasors

There need to be persons liable for the payment of damages in order to maintain the compensatory function.¹⁴⁴ The function is also especially well provided for within the framework of rules applicable in multiple tortfeasors. The legal order does not in principle lay any barriers in the way of persons claiming liability from a large number of individuals. Above all, though, it is the principle of joint and several liability that guarantees the compensatory function of damages in cases of multiple tortfeasors. Should the injured party not be able to obtain full compensation from one of the tortfeasors, there will always be another one to turn to. On the whole this means that the system places the sufferer in a better position in cases of multiple tortfeasors than where there is only one tortfeasor. It may well be that the effects of the principle of joint and several liability are facilitated through the actual idea of joint and several liability itself, an idea that in modern times appears not solely in insurance¹⁴⁵ but also in the public consciousness.

It may also be contended that the compensatory purpose of damages is fulfilled by virtue of the rules on recourse. Where a person liable in tort has made an excessive compensatory payment to the sufferer, these rules ensure the possibility of that person to reclaim the excessive amounts paid from the other tortfeasors.

¹⁴² See *e.g.* Tunc, *op. cit.*, at p. 144 and Sugarman, *op. cit.*, at p. 37.

¹⁴³ *Cf.* Tunc, *op. cit.*, at p. 143.

¹⁴⁴ *Cf.* the American legal scholar W. O. Douglas in a renowned article on employers' liability: *Vicarious Liability and Administration of Risk*, Yale L.J. vol. 38 (1928-1929), from p. 584 and p. 720, at p. 584: "Compensation for an injured party comes first, but that cannot be considered separately from the capacities of the parties, to whom the loss is allocated, to bear it".

¹⁴⁵ *Cf.* for example F. Ewald, *Die Versicherungs-Gesellschaft*, Kritische Justiz 1989, from p. 385, at p. 387.

3.3.2 The Prevention Debate

3.3.2.1 General

The discussion concerning damages influencing acts, the preventative function of damages, is an especially lively one. It is being conducted all over the world and seems to belong to the unsolved puzzles of tort law.¹⁴⁶ No meanings put forward can be supported one hundred percent. It is perhaps this uncertainty that from time to time fuels and re-ignites the debate. At any rate, the disagreement in the area has certainly spiced up the exchange of opinions. One representative in modern times of the school expressing a strong belief in prevention is the American legal theorist George Priest. He believes that prevention constitutes the *only* important purpose of damages, and that the Courts therefore should strive to this end.¹⁴⁷ Thomas Lambert is another American tort law expert who sings the praises of prevention—albeit not as forcefully as Priest. Lambert speaks of tort law’s “accident protection function or prophylactic purpose”.¹⁴⁸ His opponents have retorted, with critics such as Sugarman claiming that his arguments “unmistakably paint plaintiff lawyers as the good guys in white hats – leaders of the populist revolution against the excesses of large scale organizations that dominate American capitalism”.¹⁴⁹

One line of argumentation followed in the debate bases itself on a comparison of compensation in relation to prevention. The two are in this way almost weighed out one against the other. Whilst compensation satisfies immediate needs and demands, prevention becomes the long-term goal. Supporters of prevention may then believe that it is more important than the actual compensation itself: “Schadensverhütung ist besser als Schadensvergütung.”¹⁵⁰ The situation is reversed for those that above all want the regulatory provisions to play a compensatory function, rendering prevention sometimes less important than reparation.¹⁵¹ The strong concentration on the reparation contained in the

¹⁴⁶ One of the many evaluations that may influence the adopting of a position in the issue is presumably the political ones. According to B. Bengtsson, such evaluations seem to play a role in the context: “In Swedish Parliamentary debates and Standing Committee reports, at least during the 1970’s, one can see that those holding on to law and order usually transfer these viewpoints to tort: also here the preventative effect is considered to be great, regardless of which situation is more closely involved and what objections one has raised”. SvJT 1987, pp. 417-418, at p. 417.

¹⁴⁷ See especially his article in Val. U.L. Rev. vol. 22 (1987), from p.1.

¹⁴⁸ Lambert, *Suing for Safety*, Trial, November 1983, at p. 48.

¹⁴⁹ Sugarman, *op. cit.*, p. 25, note 5.

¹⁵⁰ The expression reproduced in H. Kötz & H.-B. Schäfer, *Schadensverhütung durch ökonomische Anreize. Eine empirische Untersuchung*, AcP Bd. 189 (1989), from p. 501, at p. 502. Cf. also H. P. Tschudi, who in 1986 claimed in a study on the Swiss social state from a more general point of view, and almost with a view to National and personal insurance: “Die wichtigste Änderung liegt ohne Zweifel in Einer Verstärkung der Prävention. Dem Einzelnen ist am besten gedient, und die Kosten werden gesenkt, wenn durch die Sozialpolitik Schäden verhindert werden. Vorbeugen ist zweckmässiger als die nachträgliche Deckung von Nachteilen.” *Die Sozialverfassung der Schweiz* (Der Sozialstaat). Berlin 1986, at p. 93.

¹⁵¹ See for example J. Ramberg, SvJT 1987, from p. 419.

preparatory works to the Swedish Damages Act have in all probability contributed to the declining significance of prevention in the Swedish debate in subsequent years.¹⁵²

This “either-or” approach is questionable. It would seem more reasonable to establish from the outset that the existence of one will not preclude the existence the other. Such a preconception answers better to reality. This more nuanced approach also finds its own counterpart in the discussion.¹⁵³

A more nuanced approach should not, however, be limited solely to the question of prevention or compensation. The precedence of one or the other should depend on the area of harm concerned.¹⁵⁴ Prevention can be presumed to have greater significance within the framework of a certain type of harm – for example when dealing with cases of pure economic loss¹⁵⁵ – than in certain other areas.¹⁵⁶ In general, it should also be reasonable to deal with companies and consumers differently.¹⁵⁷

There is one question that has remained rather untouched in the discussion so far, namely to what degree the judge will consciously have preventative considerations in mind when deciding cases. If nothing can be read from the judgment itself or from the other circumstances in general, some might claim that preventative considerations have had no influence on the Judge whatsoever. The findings of the Court should not, however, be interpreted in this way. Judges are not under any duty to illustrate legal-political reasoning in their decision-making. It may well be that the judge preferred to try and prevent injuries being caused in the future by making an award of damages in tort – thus observing prevention – rather than opting for the more lax view aimed solely at reparation.¹⁵⁸ How different would not the world look like if the only purpose of damages would be to compensate.¹⁵⁹

¹⁵² See especially B. Bengtsson, SvJT 1987, p. 417; see also Dufwa, *op. cit.*, at p. 413.

¹⁵³ As early as 1888, the Austrian economist V. Mataja maintained that: “Keine Gesetzgebung der Welt kann einen eingetretenen Schaden beseitigen, das Recht steht demselben machtlos als einer vollendeten Tatsache gegenüber. Die Gesetzgebung kann daher in Beziehung auf die Schadensgefahr nur zwei Zwecke verfolgen: sie kann danach trachten 1. möglichst vorbeugend zu wirken und 2. den gleichwohl eingetretenen Schaden jenen Personen zuzuwenden, welche nach den Forderungen der Gerechtigkeit und dem volkswirtschaftlichen Interesse als die geeignetsten Trägerinnen der Last erscheinen”. Mataja, *Das Recht des Schadenseratzes vom Standpunkt der Nationlökonomie*, Leipzig 1888, at p. 119; also quoted in Brüggemeier, in note 36 above *op. cit.*, at p. 514).

¹⁵⁴ Prevention may be considered of particular importance in the area of environmental harm, for example; *cf.* B. Bengtsson, SvJT 1987, at p. 418.

¹⁵⁵ *Cf.* B. Bengtsson, *loc. cit.*. Conradi is of a different belief when it comes to suffering given rise to in connection with certain crimes according to Chapter 3, Section 3 of the Damages Act (*op. cit.* at p. 417); he believes that the reparative function should be brought more to the fore here.

¹⁵⁶ *Cf.* the Minister’s distinction between personal injuries and damage to property in this context, in prop. 1972:5, at p. 97; “Preventative points of view must probably also be afforded greater weight in the area of damage to property”.

¹⁵⁷ See Dufwa, SvJT 1987, at p. 414.

¹⁵⁸ *Cf.* D. Laycock, *The Death of the Irreparable Injury Rule*. New York, Oxford 1991, at p. 3.

¹⁵⁹ *Cf.* G. Calabresi, *The Decisions for Accidents: An Approach To Nonfault Allocation of Costs*, Harv. L. Rev. vol. 78 (1965), from p. 713, at p. 713: “Many recent writers have

3.3.2.2 Multiple Tortfeasors

No principal difference is made in the prevention debate between cases of multiple tortfeasors and cases involving single tortfeasors. However, such a difference might be discussed. Let us assume that A and B have caused some form of harm. Would the prevention concerning A be more effective in this case than it would have been if A had been the sole tortfeasor?

When a Norwegian legal scholar recognises that all wrongdoers are liable in cases involving coinciding and sufficient causation of injury, he is not claiming without reason that joint and several liability in these cases can, amongst other circumstances, be based on prevention. “When all become liable, this will contribute to that all will be trying to stop or limit the damage.”¹⁶⁰

It could be said generally speaking that the preventative effect ought to increase the larger the number of liable persons. This truth counts even if A has to answer for B’s intentional act. There are also examples in Norwegian legislative work considering that A ought to be imposed with tortious liability precisely because he had the possibility to prevent B’s intentional action.¹⁶¹

One thing is, however, desired of A – that he observes both his own and B’s concurrent actions. Yet how can we demand that A take account of B’s subsequent action, especially where this action is carried out much later? Not in the least it may seem as though A had little opportunity to prevent B’s injurious act where this later is intentional. Bearing this in mind, it is difficult to attach any great importance to the notion of prevention in this situation.

As a matter of fact, one might well ask whether it is not the case that the preventative effect decreases where the liability of a number of people arises. Each one relies on the other. This affects the individual conduct. The more persons that are deemed liable, the greater the risk that this will be the case.

Already the uncertainty that reigns in these situations signify that the difficulty inherent in determining what effect prevention can have should generally be greater in cases of multiple tortfeasors than where there is only one tortfeasor.

3.3.3 General Deterrence

3.3.3.1 Introduction

General deterrence or economic prevention involves influencing through the aid of damages the choice of conduct that all economic strategies are based on. It should appear more attractive to invest in safety devices – or possibly to refrain

tended to focus on compensation as the main purpose of accident law. Were this emphasis proper, here would be no justification for limiting compensation to accidents and not spreading it across the board to illness, old age, and all the troubles of this planet”.

¹⁶⁰ P. Lødrup, *Lærebok i erstatningsrett*. 2nd ed. Oslo 1987, at p. 221.

¹⁶¹ See thus NOU 1981:33, at p. 26. Here the issue of exemption from objective liability in tort – as promoted by the Investigation – for petroleum activities at sea was discussed. Should liability also encompass harms caused by another intending wrongdoer? The answer came in the affirmative.

from the action – than to pay damages. Two preconditions must be met in order for economic deterrence to work. Firstly, the amount of damages must to a reasonable degree correspond to the price placed by society on not having to cover the costs resultant from injury (price-fixing). Secondly, tort law must ensure that the damages are attached to the activity best placed to verify these costs (internalising rather than externalising). The entire operation is left primarily in the hands of the insurance companies; the size of premiums will be decisive for which course of action is deemed preferable.¹⁶² That general deterrence is an extremely important function of tort is a common understanding, especially in current American tortious doctrine.¹⁶³

General deterrence is in general aimed at potential wrongdoers. One can also discuss, however, what possibilities exist to affect the actions of injured parties through economic strategies. In reality, general deterrence often involves the question who is best placed to influence the course of events: the wrongdoer or the sufferer? The rules on contributory negligence can therefore be shaped to a certain extent bearing the idea of general deterrence in mind. From this point of view, it could for example be considered more appropriate to allow the sufferer to bear the economic consequences of acts of intentional contribution alone.¹⁶⁴

Although the discussion surrounding general deterrence concerns not only damages but also sometimes excesses and bonus losses, the further presentation below will be limited solely to the former.

3.3.3.2 Price-fixing

Already the first prerequisite condition stipulated above for the theory of general deterrence to fall into place – the calculation of the amount of compensation – involves considerable problems. These seem to be at their greatest within the realm of personal injury. The damages awarded upon the death of an infant may in principle be limited to covering the costs of the funeral. This would surely not match the price that society places on the life of a child. The grief experienced by family, friends and colleagues following death is normally not covered by the award of damages; still there is a question of a cost borne by those people. It seems obvious that tort quite simply underrates the costs in cases involving personal injury, in this way failing to attain adequate interest in safety.¹⁶⁵

¹⁶² Cf. W. Pfennigstorf, *The Challenge of Man-Made Disasters*, NFT 1990, from p. 42, p. 47 (“The challenge of prevention”).

¹⁶³ *Reporter’s Study on Enterprise Responsibility for Personal Injury*. The American Law Institute. April 15, 1991. Philadelphia 1991. Vol. I: The Institutional Framework, at p. 32.

¹⁶⁴ It has been said that rules on contributory negligence that are too generous towards the injured party – such as the Swedish ones are when it comes to personal injuries *cf.* 3.2.2.2 above – may encourage carelessness, as the victim obtains compensation regardless of his conduct. This view is usually rejected in its entirety (see *e.g.* Marx, *Ohio St.L. J.* vol. 15 (1954) (in note 24 above *op. cit.*, *Compensation Insurance...*), at p. 147: “This charge is utterly fantastic. No one is going to allow himself to be injured in order to secure compensation that is less than his weekly wage”).

¹⁶⁵ So R. A. Posner, *A Theory of Negligence*, *J. Legal Studies* vol. 1 (1972), from p. 29, at p. 47, and R. J. Pierce, Jr, *Encouraging Safety: The Limits of Tort Law and Government Regulation*, *Vand. L. Rev.* vol. 33 (1980), from p. 1281, at p. 1295, note 31. See also H.-B.

3.3.3.3 Internalisation

Even the insistence on internalisation bids great problems already for the simple reason that the injured party perhaps does not even make a claim for damages at all; instead, with compensation is coming out of the sufferer's own national or private insurance. This gives rise to an undesirable externalisation. High transaction costs or difficulties in proving causation and fault can contribute to the same result.¹⁶⁶

Causation is the most important of these last mentioned factors. Verification of a causal relation in cases of product damage or environmental harm for example may prove an insuperable task for the sufferer. Richard J. Pierce Jr., an American legal scholar, stated in 1980 that "causation problems have led to an almost complete breakdown in the tort system as a mechanism for internalizing accident costs in several important areas".¹⁶⁷

Where the sufferer has to prove fault in order to claim damages and he or she is successful, this does not necessarily mean that the most suitable cost bearer has been found. Calabresi has established the poor relation between proving fault and the alleged cost unit, for which he has provided three explanations.¹⁶⁸ The first is that many of those considered culpable quite simply lack the information or knowledge necessary to allow them to be influenced by a pending threat of an award of damages against them.¹⁶⁹ The second is that the fault those people are responsible for are of a more inescapable and human nature, and thus would not be affected by the possible imposition of tortious liability.¹⁷⁰ The third reason is that legal rules provide no guarantee that a person found liable in fault will be the most appropriate subject of liability.¹⁷¹

Would strict liability be better placed to promote general deterrence? Those opposing this argue that strict liability cannot have the effect of promoting deterrence since strict liability will arise even if the wrongdoer has taken appropriate preventative measures (e.g. by putting up a fence) but the harm nevertheless occurs (e.g. because someone made a hole in the fence). Others are – just like Calabresi – more inclined to accept strict liability from a deterrent point of view. Looking at the traditional discussion concerning the suitability of introducing strict liability, one might well ask whether not the whole idea of deterrence found expression already here, albeit less refined and detailed as in the current debate. Belonging to this discussion we find the French risk theory.

Schäfer & C. Ott, *Lehrbuch der ökonomischen Analyse des Zivilrechts*. Berlin, Heidelberg 1986, p. 85, and G. Brüggemeier, ZHR vol. 152 (1988) (in note 136 above *op. cit.*), p. 514.

¹⁶⁶ Both illustrative of and renowned in American legal literature as an example of the difficulty in proving fault (see Pierce, *op. cit.*, at p. 1297), is one particular product injury case. It involved injuries caused to over 5.000 people by the pharmaceutical product MER/29. For more, see further in P. D. Rheingold, *The MER/29 Story – An Instance of Successful Mass Disaster Litigation*, Calif. L. Rev. vol. 56 (1968), from p. 116, at p. 117.

¹⁶⁷ Pierce, *op. cit.*, at p. 1298.

¹⁶⁸ G. Calabresi, *The Costs of Accidents. A Legal and Economic Analysis*. New Haven, London, p. 244.

¹⁶⁹ *Op. cit.*, at p. 245.

¹⁷⁰ *Op. cit.*, at p. 256.

¹⁷¹ *Loc. cit.*, at p. 256.

Many formulations concerning strict liability that go in the same direction are also to be found in the Germanic legal circle; “Eigene Initiative, eigene Gefahr”, or “Jeder hat die Kosten der Geltendmachung seiner Interessen selbst zu tragen.”¹⁷² Corresponding viewpoints may also be found in the Swedish debate.

The American legal theorist Latin is another representative of the view that strict liability is best placed to achieve deterrence.¹⁷³ He has also formulated a concrete proposal according to which car manufacturers would compensate for all personal injuries caused by their cars, regardless of whether the vehicles were defect or not.¹⁷⁴ Latin contends that the imposition of such liability would induce car producers to invest more money in safety measures such as airbags, braking systems and steering mechanisms.

Richard Posner – another American legal scholar and also a Judge- has raised serious objections to Latin’s proposal.¹⁷⁵ Posner called into question the entire base of Latin’s reasoning, claiming it to be unscientific.¹⁷⁶ One of the objections is that forcing individuals to have regard for others (e.g. the brakes) and forcing them to protect themselves (e.g. the airbags) are two completely different things. Posner believes Latin to have mistakenly brought these two separate questions together, dealing them effectively as one and the same issue.¹⁷⁷ Posner also reacts to what he interprets as Latin’s refusal to take seriously studies showing that individuals – not least car drivers – actually do react to legal signals.¹⁷⁸

172 Or: “Die Zufallschaden sind ein Teil der Betriebsunkosten des Unternehmers”. See J. Esser, *Grundlagen und Entwicklung der Gefährdungshaftung. Beiträge zur Reform des Haftpflichtrechts und zu seiner Wiedereinordnung in die Gedanken des allgemeinen Privatrechts*. 2nd ed. München 1969, at p. 65.

173 See H. A. Latin, *Problem-Solving Behaviour and Theories of Tort Liability*, Calif. L. Rev. vol. 73 (1985), from p. 677.

174 *Op. cit.* from p. 726; see also from p. 689.

175 R. A. Posner, *Can Lawyers Solve the Problems of the Tort System?* Calif. L. Rev. vol. 73 (1985), from p. 747.

176 See for example the shot he fires off in *op. cit.*, at p. 748. “What are we to call legal scholarship that comes up with proposals of this sort, on grounds of this sort? It is not legal-doctrinal scholarship. Although Professor Latin cites cases, he is not interested in exploring the relations between cases, discovering the hidden rationales of legal rules, or finding new patterns; the cases merely illustrate his thesis that organizations are more responsive than individuals to the incentives created by tort liability. The article is not economic analysis, either; it does not use economics consistently or systematically. For example, while acutely sensitive – perhaps hypersensitive – to the information costs of individual consumers or drivers in making safety choices, Professor Latin is insensitive to information and agency costs within organizations. These costs, however, might impair, or even obliterate, the transmission of safety directives within the organization. Such costs have to be compared with the information costs of drivers, consumers, etc., in trying to avoid accidents by complying with norms of tort law. Professor Latin does not make this comparison, and, as we shall see, he ignores evidence that nonorganization man is a more efficient accident preventer than he believes.”

177 *Loc. cit.*

178 *Op. cit.*, at pp. 749-750, where Posner refers to S. Peltzman, *The Effects of Automobile Safety Regulations*, J. Pol. Econ. vol. 83 (1975), from p. 677, who concludes that the seat-belt requirement increased the number of pedestrians killed in traffic because drivers who feel safer drive faster.

Where potential wrongdoers lack the knowledge concerning the legal state of affairs applicable in a given situation, this may constitute another factor leading to externalisation. The message of a threat of an imposition of liability in tort has to be received in order for deterrence to be effected. Who is to blame if that message is not passed on? An American legal theorist has pointed to “rapid legal change, state-to-state variance, the perceived lotterylike nature of secret jury decision making, the vagaries of trials, pervasive rough-and-ready settlement practices, and doctrinal complexity”;¹⁷⁹ one practical example would be a psychiatrist’s lack of knowledge concerning the significance of the Tarasoff case.¹⁸⁰ Capricious application of the law will not prove a suitable basis for the provision of reasonable information. American legal scholars have complained from this view about the difficulties in America of damages for pain and suffering attaining their ideal preventative function.¹⁸¹

The value attached to public trials appears more clearly in this respect. To the extent that the international asbestos industry were not aware of the dangers inherent in the use of asbestos, it most certainly became so following the commencement¹⁸² of highly publicised court proceedings during the 1960’s.¹⁸³

One might also argue that ignorance in this regard may prove advantageous in certain instances. Even suspicion can lead to the exercise of caution.¹⁸⁴ As long as the fault rule applies to a specific area of harm, one can perhaps rely on the general sentiment of what applies to those considering or actually undertaking a certain activity; this is undoubtedly on advantage of the rule. Under strict liability this would not normally be the case.

Besides legal ignorance, the American debate has also focussed on actual ignorance concerning the risks involved in the activity in question. “Because full rationality often takes too much time, money or attentiveness, people may be content to rely on shortcuts such as rules of thumb or advice and customs of others.”¹⁸⁵

It used not to be considered possible to prevent harm caused by development risks in connection with product liability, which provided an illustration of the pointless task of working with prevention. More recent times have, however, seen prevention regarded as operable with this type of harm as well.¹⁸⁶

¹⁷⁹ Sugarman, in note 21 above *op. cit.*, at p. 7.

¹⁸⁰ Tarasoff v. Regents of University of California, (1976) 17 Cal. 3d 425, 131 Cal Rptr. 14,551 P.2d 334. *Cf. op. cit.*, at p.26, note 9.

¹⁸¹ See R. R. Bovbjerg, F. A. Sloan & J. F. Blumstein, *Valuing life and limb in tort: scheduling “pain and suffering”*, Nw. U.L. Rev. vol. 83 (1989), from p. 908, at p. 925. (“To send more effective – and efficient – deterrent signals to defendants, the system should focus primarily on consistency, predictability, and prompt settlement”).

¹⁸² The trigger was provided through Borel v. Fibreboard Paper Products Corporation, 493 F.2d 1076 (5th Cir. 1973).

¹⁸³ *Cf.* J. J. Phillips, *In Defense of the Tort System*, Ariz. L. Rev. vol. 27 (1985), from p. 603, at pp. 613-614.

¹⁸⁴ According to Sugarman, *op. cit.*, at p. 7.

¹⁸⁵ *Op. cit.*, at p. 8.

¹⁸⁶ See Ds 1989:79, at p. 102 (“If industry instead is imposed with a strict liability for development-related harms, there may be an incentive for increased efforts in favour of such research”); and, from foreign doctrine, G. Hager, *Umwelthaftung und Produkthaftung*,

The now classical objection raised against prevention in tort today is made with reference to third party or liability insurance.¹⁸⁷ This is a point that has weighed heavily in the debate. It may appear irrefutable. If you have the possibility of acquiring third party liability insurance, will this not also reasonably lead to the idea of economic prevention being shot to pieces?¹⁸⁸ Why would such a policy holder need to ponder further over different courses of conduct when the insurance itself will constitute the major source of compensatory payment following harm caused by his or her actions?

The answer to these questions are by no means a given. Even those adopting a critical stance in principle against tort law as such, have opposed the accuracy of such a proposed effect of liability insurance.¹⁸⁹ To the contrary it has been stressed that liability insurance has a beneficial preventative impact. Liability insurers have the resources necessary in order to increase security through special programmes,¹⁹⁰ and the terms of the policy stipulate regular demands for the taking of precautionary measures on the part of the policy holder.¹⁹¹ It is also pointed out that third party liability insurance contributes towards proper conduct by precluding irresponsible speculation such as avoiding obtaining a policy; insurance protection requires one to make regular premium payments.¹⁹²

JZ 1990, from p. 397, at p. 399 (“Der Produzent selbst treibt durch seine Forschung den Erkenntnisprozess voran. Haftung für Entwicklungsrisiken könnte insofern durchaus wichtige Anreize zur Intensivierung der Sicherheitsforschung setzen”).

187 See for example S. Frédéricq & R. Kruithof, *La responsabilité professionnelle du fait des produits*. From: *Rapports belges au Xe Congrès international de droit comparé*, Budapest, 23-28 août 1978. Brussels 1978, at p. 131 („L’essor des assurances a limité l’action préventive du système du responsabilité fondée sur la notion de faute.”) and, from the Swedish debate, J. Ramberg, *SvJT* 1987, from p. 419. See also B. W. Dufwa, *op. cit.*, p. 413. See further Pierce, *Vand. L. Rev.* vol. 33 (1980) (in note 165 above *op. cit.*), p. 1298. Legal-economical contributions on the issue are I. Hanson & G. Skogh, *Moral hazard and safety regulation*. Lund 1987, and I. Hansson, C. H. Lyttkens & G. Skogh, *The excess burden of public insurance*, *Int’l Rev. L. & Econ.* vol. 4 (1984), from p. 23. Cf. further von Eyben, in note 16 above *op. cit.*, p. 234.

188 One may ask in the same vain whether Social Insurance has negative effects on prevention. Regarding this question, see G. Skogh, *Public insurance and accident prevention*, *Int’l Rev. L. & Econ.* vol. 2 (1982), from p. 67, and *ibid.*, *The combination of private and public regulation of safety*. From: *Essays in Law and Economics*. Ed. by M. Faure and F. Van den Bergh. Antwerpen 1989, from p. 87.

189 Among these we find Fleming James; see *ibid.*, *The Law in Midstream: Its Challenge to the Judicial Process*, *Buffalo L. Rev.* 1959, from p. 315, at p. 331, note. 81 (“Experience has now shown that the presence of insurance against liability for accidents does not lead to any increase in accidents caused by insured persons”). See also F. James & J. V. Thornton, *The Impact of Insurance on the Law of Torts*, *Law & Contemp. Probs.* vol. 15 (1950), from p. 431, at p. 441.

190 Thus reasoned by Fleming & Thornton, *loc. cit.*

191 Cf. P. Lyngsø, *Danish Insurance Law*. Deventer, Boston 1992, at p. 167.

192 See J. Fleming, *The role of negligence in modern tort law*, *Va. L. Rev.* vol. 53 (1967), from p. 815, at p. 825; and A. M. Linden, *Canadian Tort Law*. 4th ed. Toronto, Vancouver 1988, at p. 478. Critical to this approach: P. S. Atiyah, *Ind. L. J.* 1981, from p.1.

A further basic train of thought in the theory of deterrence is that actions can be affected through the appropriate fixing of premiums.¹⁹³ This idea is based on the premise that third party liability insurance should reflect the danger that the activity in question represents. This rapprochement between danger on the one hand and premiums on the other is known as “experience rating” in the international debate.¹⁹⁴ One widespread, empirical and partly substantiated understanding¹⁹⁵ is that premium fixing of this kind not always is as it should be. The reasons for this have been debated the world over,¹⁹⁶ signifying the particular need for reform in this area.¹⁹⁷

Experience rating took no place within the framework of the special compensatory systems developed in New Zealand; at least it did not previously. Terence Ison, an authority on the public compensatory arrangements in question, was delighted concerning the state of affairs.¹⁹⁸ His joy is not shared by all, however. To the contrary, the absence of experience rating has been criticised from several quarters.¹⁹⁹ In its report in 1988 on compensation for personal injury, no proposals were made by the New Zealand Law Commission for any particular preventative measures to be introduced to fortify the compensatory arrangement in question.²⁰⁰ Tortious doctrine in New Zealand witnesses disappointment with the omission.²⁰¹ Three legal scholars – one of them being the renowned Jeffrey O’Connell – suggested “backing up” the compensatory arrangement with either a partial restoration of tort law or alternatively also with possibilities for recourse actions from the particular insurance arrangement.²⁰²

¹⁹³ Even this is emphasised in Fleming & Thornton, *op. cit.* See also G. Viney, *Le déclin de la responsabilité individuelle*. Paris 1965, at p. 178; and *ibid.*, *La responsabilité: Effets. Réparation en nature, Dommage et intérêts, etc.* Paris 1988, at p. 255.

¹⁹⁴ Regarding experience rating, see T. G. Ison, *Accident Compensation. A Commentary on the New Zealand Scheme*. London 1980, at p. 130.

¹⁹⁵ See e.g. Pierce, *Vand. L. Rev.* vol. 33 (1980) (in note 165 above *op. cit.*), at p. 1298.

¹⁹⁶ See C. Brown, *Deterrence and Accident Compensation Schemes*, *U.W. Ont. L. Rev.* vol. 17 (1978-1979), from p. 111, at pp. 119, 137 and 150. The difficulties in carrying through such a premium fixing and the costs resulting would be contributing causes to it not taking place. For a critique of experience rating, see T. G. Ison, *The significance of experience rating*, *Osgoode Hall L.J.* vol. 24 (1986), from p. 723. His summarising evaluation is: “Experience rating, however, is very damaging” (at p. 742).

¹⁹⁷ See Phillips, *Ariz. L. Rev.* vol. 27 (1985) (in note 183 above *op. cit.*), at pp. 612-613.

¹⁹⁸ In the face of the impending risk of experience rating being introduced in New Zealand, T. G. Ison cried: “That would be a disaster” (Ison, *Débat “de lege ferenda” sur l’indemnisation du prejudice corporel*, *R.G.D.* vol. 18 (1987), from p. 201, at p. 201).

¹⁹⁹ Among the critics we find: Brown, *op. cit.*, p. 111; L. N. Klar, *New Zealand’s accident compensation scheme: a tort lawyer’s perspective*, *U. Toronto L. J.* vol. XXXIII (1983), from p. 80, at p. 89; and *ibid.*, *A Commentary on the New Zealand Accident Compensation Scheme*, *Alta. L. Rev.* vol. XXVI (1988), from p. 319, at p. 326.

²⁰⁰ Law Commission Report No. 4. *Personal Injury: Prevention and Recovery*. Wellington 1988.

²⁰¹ So by M. A. McGregor Vennell, *Torts*, *N.Z.R.L. Rev.* 1989, at p. 186 (“The Report is disappointing in that no consideration has been given to introducing any deterrent element into the scheme”).

²⁰² J. O’Connell, C. Brown & M. A. Vennell, *Reforming New Zealand’s Reform: Accident Compensation Revisited*, *N.Z.L.J.* 1989, from p. 399, at p. 399.

3.3.3.4 Reality

Belief in general deterrence has in certain instances demonstrably impacted on the legislature. This was the case as far as Sweden is concerned, illustrated for example with reference to the Environmental Harm Act. The preparatory works to the Act reveal reasoning along the lines of deterrence that impacted on the design of the Act itself; not least in relation to the discussion concerning insurance and fund solutions as well as other alternatives to what became enacted.²⁰³

The experience in Germany was essentially the same, with the German UmweltHG based on ideas revolving around economic prevention.²⁰⁴ Environmental activists often reason along same line that has given rise to the economic theory in question; tortious liability is regarded as integral and therefore actions are brought. The courts may well take considerations of this kind into account, albeit that time and tradition have hardly allowed for a more thorough investigation into the theory of deterrence. Empirical research carried out in Germany provides irrefutable evidence that economic prevention is a reality.²⁰⁵

3.3.3.5 The Debate

It is not difficult to find support in Swedish and international legal writing for the opinion that economic prevention is an essential, not to say necessary goal pursued in legal policy when it comes to the shaping and application of tort law.²⁰⁶ Even those generally sceptical to prevention and its ability to assert itself in tort, can still find economic prevention credible.²⁰⁷ It is clear from the international literature that belief in general deterrence does not presuppose a one hundred percent conviction that tort law is an exemplary regulatory system.²⁰⁸

²⁰³ See SOU 1983:7, at p. 212; see also at p. 128.

²⁰⁴ See F. Nicklisch, *Umweltschutz und Haftungsrisiken – Rechtsfragen der Umwelt, Gentechnik – und Abfallhaftung* –, VersR 1991, from p. 1093, at pp. 1093 and 1098.

²⁰⁵ See H. Kötz & H.-B. Schäfer, AcP Bd. 189 (1989) (in note 150 above *op. cit.*), at p. 501.

²⁰⁶ See e.g. H.-W. Micklitz, *Produzentenhaftung – ein Problem des Verbraucherschutzes? Thesen zur Ergänzung der Reformdiskussion*, ZfV 1979, from p. 329, at p. 338: “Eine Verbesserung der Sicherheit der Verbraucher verlangt aber, gerade die Präventivmassnahmen zu forcieren und zu verbessern. Auch die beste Haftungsregelung kann nicht darüber hinwegtäuschen, dass sie nicht nur damit beschäftigt, Risiken zu verteilen und Schäden zu kompensieren.”

²⁰⁷ See e.g. J. Esser und H.-L. Weyers, *Schuldrecht*. Bd. II. Besonderer Teil. 7th ed. Heidelberg 1991, at p. 527: “Wo Unfälle durch planende und organisierende Tätigkeit vermieden werden können und ein ökonomischer Druck zu ihrer Vermeidung besteht, hat Prävention durch Haftpflichtrecht durchaus Wirkungsmöglichkeiten. Im übrigen fehlen aber gerade in unfallträchtigen Situationen (Strassenverkehr) meist die psychologischen Voraussetzungen für eine selbständige Bedeutung des Haftpflichtrechts”.

²⁰⁸ In an article written by the Canadian legal theorist Michael J. Trebilcock in U. Toronto L.J. vol. XXXIX (1989), from p. 219, called *Incentive issues in the design of ‘no-fault’ compensation systems*, the author strictly emphasises many of the renowned weaknesses of tort. Nevertheless, the theme of the whole article was that “(...) no compensation scheme

Nevertheless, everybody does not believe in economic prevention.²⁰⁹ Countries where product liability has become too heavy a burden for industry to bear have bad experiences from this form of prevention. Changes and amendments have taken place. No one is in doubt as to the root of the evil; oversized deterrence.²¹⁰ When the New Zealand Torts and General Law Reform Committee in 1974 considered introducing a pure strict product liability for damage caused to property, the result was negative; besides from the A.C.A covering personal injury, the Committee found that there was no pressing need for change.²¹¹ They explained in this connection: “Tort liability has no deterrent value. Other deterrents or incentives to care seem far more significant than tort liability”.²¹²

And cautiousness bids us perhaps not to make too absolutely sure conclusions. The extent to which companies actually have pay regard to

can responsibly disregard incentive effects, particularly incentives to reduce the frequency and severity of injury claims. I accept the tort system as a system of compensation is appallingly inefficient, and that a strong prima facie case exists for the adoption of some form of non-tort method of compensation; but when we begin to turn our minds to ways in which alternative compensation schemes might be designed, we are quickly driven to the realization that the compensation and deterrence goals ascribed to the tort system cannot be separated and will require reconciliation in any compensation scheme. If we are to effect this reconciliation, many of the problems that currently plague the tort system will have to be confronted in new legal or institutional contexts. It may well be possible for us to achieve a better set of trade-offs than the tort system has achieved or is even likely to achieve. But to pretend that the trade-offs do not exist, or to assume that safety issues can be confidently remitted elsewhere in the legal system when the evidence does not warrant such confidence, is to espouse the untenable proposition that compensating for accidents is better than preventing them.” At p. 220. See further, e.g. T.M. Schwartz, *The Role of Federal Regulations in Products Liability Actions*, Vand. L. Rev. vol. 41 (1988), from p. 1121, at p. 1169: “The tort system is hardly perfect, and reforms are clearly needed to reduce the transaction costs of the system, but it continues to serve as an independent incentive for product safety in this country”.

²⁰⁹ Of the jurisprudential contributions from recent years that breath an air of scepticism towards economic deterrence, C. Brown, U.W. Ont. L. Rev. vol. 17 (1978-1979) (in note 196 above, *op. cit.*), p. 111, is worth noting.

²¹⁰ Senator Kasten made the following statement in 1982: “Now the philosophical conflicts within the current products liability system have caused practical problems for business. The cost is too much for some, has deterred product development, it has been burdensome on interstate commerce. I particularly want to talk about the product development aspect of it, because this is something that has become very, very clear in the hearings and as we have worked with literally hundreds of people, the fact is that because 1982 products model is being used to judge whether or not the 1970 model was safe or unsafe, we, in fact, are slowing down the progress in efficiency. We have a disincentive to make the product more safe, because a new product is being used as evidence that you could have done it this way all along. The effect is to prevent it from being done at all”. This statement can also be found in L. R. Frumer & M. I. Friedman, *Products Liability*. Vol. 1-5. New York 1992 § 9.02[3][f].

²¹¹ See *Products Liability. Report of the Torts and General Law Reform Committee*. Presented to the Minister of Justice in March 1974. Wellington 1974, at p. 20. The minority nevertheless wanted to introduce a strict product liability. See also G. W. R. Palmer, *Dangerous products and the consumer in New Zealand*, N.Z.L.J. 1975, from p. 366, where a product safety programme is developed.

²¹² The Committee instead opted to put faith in above all increased product safety and the fear of a loss of goodwill. See New Zealand, Report, *op. cit.*, at p. 16.

hypothetical damages is as yet not entirely clear; empirical evidence is lacking on this point.²¹³ The closer tort comes to being classified as a lottery, the more inclined company executives might be to entertain hopes of non-liability in tort.²¹⁴ Furthermore, in certain cases the consequences of economic prevention can be so offensive that not even the most hard-boiled businessman will be prepared to subject himself to its rules. One can argue with good reason along the lines of a certain English legal scholar: "...it is one thing to decide that we should pay rape victims £1000 in compensation; but it would be quite another to decide that it would be cheaper to pay off the two victims that will predictably get raped in some particularly dark street than to install a £3000 lighting system."²¹⁵ There are quite simply limits to how far economic prevention can be pushed.

A tortious liability need not either always have an economic impact such as that mentioned so far. It might have a reverse effect. According to Landes and Posner, one example of this is contained in liability for omission to act. Under common law, there is in principle no duty to act. According to these scholars the introduction of such liability could lead to a decrease in the number of interventions attempting to rescue others from harm.²¹⁶

The discussion surrounding economic prevention seems to have been conducted mainly on the other side of the Atlantic. The conditions, as always, are partly too particular for the debate to be profitable for other countries. For example, those critical to economic deterrence have referred to the jury's inability to arrive at adequate decisions in cases.²¹⁷ One can state, however, that it was simply not possible to reach an agreement. Two schools of thought are mooted against each other. The one side is represented by the likes of Landes and Posner arguing that American tort law in its present day shape is effective and contributes to maintaining a low level of accident costs.²¹⁸ The other side, is

²¹³ For America, see J. J. Donohue III, *The law and economics of tort law: the profound revolution. Book Review*, Harv. L. Rev. vol. 102 (1989), from p. 1047, at p. 1050, note 16 ("(...) there has been surprisingly little empirical examination of the fundamental question whether the tort system does in fact deter"), with further references.

²¹⁴ R. L. Abel, *£'s of Cure, Ounces of Prevention. Book Review*, Calif. L. Rev. vol. 73 (1985), from p. 1003, at p. 1005: "Tort damages perform no better in deterring inefficient risks. The low probability that a tortfeasor will be held liable undermines and may even nullify the efficacy of tort law as a mechanism for ensuring optimal safety. A rational entrepreneur looking at the probability of having to pay damages almost always will gamble on risk rather than safety".

²¹⁵ R. E. Goodin, *Theories of Compensation*, Oxford J. Legal Stud. vol. 9 (1989), from p. 56, at p. 74.

²¹⁶ W. M. Landes & R. A. Posner, *The economic structure of tort law*. Cambridge (Massachusetts), London 1987, at p. 146. For a criticism against this view, see: I. Ayres, *A Theoretical Fox Meets Empirical Hedgehogs: Competing Approaches to Accident Economics. Book Review*, Nw. U.L. Rev. vol. 82 (1988), from p. 837, at p. 841; cf. Donohue III, *op. cit.*, at pp. 1054-1055, note 24.

²¹⁷ Cf. *Reporter's Study on Enterprise Responsibility for Personal Injury*, in note 163 above *op. cit.*, at p. 33.

²¹⁸ See especially Landes & Posner, *op. cit.*, p. 312. A study that Landes & Posner to a great extent base themselves on was carried out by Elisabeth Landes and published: *Insurance, Liability, and Accidents: A Theoretical and Empirical Investigation of the Effect of No-*

advocated by Steven Shavell.²¹⁹ According to him the tortious rules to the contrary contain such serious breaches from the point of view of deterrence that one should consider replacing the rules with other compensatory systems.²²⁰ It seems clear meanwhile that the theory of deterrence has more supporters than it does critics.²²¹

America is by no means the only country in which the debate has had such a turbulent effect. An intense debate concerning deterrence has also been conducted in other countries in recent years.²²²

3.3.3.6 Multiple tortfeasors

General deterrence presupposes that damages are directed towards the most appropriate cost bearer. This lies at the very heart of the theory itself. The choice is to be left to the prospective wrongdoers who should have as much information and freedom as possible to make the right choice.²²³ One could say with slight exaggeration that cases involving multiple tortfeasors, where the injured party can choose between a number of liable individuals, offer more ideal conditions for general deterrence to function within than in cases involving one single tortfeasor. Landes and Posner drew attention in 1980 to the fact that it is entirely

Fault Accidents, J.L. & Econ. vol. 125 (1982), from p. 49. According to this study, the costs in the area of traffic injuries would increase by 15% if tort was to be replaced in the field by no-fault insurance. This study has, however, been criticised; see L. A. Kornhauser, *Theory and Fact in the Law of Accidents*, Calif. L. Rev. vol. 73 (1985), from p. 1024; and J. O'Connell & S. Levmore, *A Reply to Landes: A Faulty Study of No-Fault's Effect on Fault?* Mo. L. Rev. vol. 48 (1983), from p. 649. Criticism has also heralded from non-economic quarters against Posner's theories; see F. J. Vandall, *Judge Posner's negligence—efficiency theory: A critique*, Emory L.J. vol. 35 (1986), from p. 383.

²¹⁹ See S. Shavell, *Economic Analysis of Accident Law*. Cambridge (Massachusetts), London 1987.

²²⁰ See Shavell, *op. cit.*, at p. 294, where he claims that “not only does there seem to be considerable consistency, but there also seems to be substantial ambiguity and inconsistency between the liability system that we observe and the regime that is best given the criteria of optimality and the models examined here”. Shavell works with various models and does not, as opposed to Landes & Posner, set up any specific goals for his research, thereby leaving a more cautious and neutral impression. It is therefore doubtful whether one can speak here of a “school”.

²²¹ See *Reporters' Study on Enterprise Responsibility for Personal Injury*, in note 163 and 217 above *op. cit.*, at p. 32, note 50.

²²² Beyond those mentioned below and worth noting are, for Germany: P. Trimarchi, *Die Regelung der Vertragshaftung aus ökonomischer Sicht*, ZHR 1972, from p. 118; N. Horn, *Zum ökonomischen Rationalität des Privatrechts. – Die privatrechtstheoretische Verwertbarkeit der 'Economic Analysis of Law'*, AcP vol. 176 (1976), from p. 307; H.-D. Assman, C. H. Kirchner & E. Schanze, *Ökonomische Analyse des Rechts*. Kronberg 1978; Adams; P. Behrens, *Die ökonomischen Grundlagen des Rechts. Politische Ökonomie als rationale Jurisprudenz*. Tübingen 1986; for New Zealand: D. Partlett, *Economic analysis and some problems in the law of torts*, Melb. U. L. Rev. vol. 13 (1982), from p. 398; for Australia: D. Partlett, *Economic Analysis and Some Problems in the Law of Torts*, Melb. U. L. Rev. vol. 13 (1981-1982), from p. 398.

²²³ See Calabresi, in note 168 above *op. cit.*, at p. 150, discussing who “the best briber” is.

possible to achieve deterrent effect in cases of multiplicity through joint and several liability without a right of recourse.²²⁴

The difficulties in working with this theory are nevertheless no less in cases involving multiple tortfeasors than those involving only one. Problems revolving around price-fixing and internalisation (see above) arise in these cases just as otherwise. Of all the issues discussed above and as the internalisation gives rise to, the problem of causation deserves special note. Causation can be extremely difficult to prove in cases of multiple tortfeasors.²²⁵

Perhaps more serious still is that the injured party may not select the person in the best position to have prevented the damage from happening. The rules in cases of multiplicity indeed give the injured party the right to choose freely between various subjects of liability. The blade would often fall to the disadvantage of the person best placed to compensate for the harm caused; the hunt for the most suitable compensator has been termed “the search for the deep pocket” in American doctrine – and not without reason.²²⁶ It may suffice, however, that a special relationship exists between the sufferer and the selected party for other liable persons to enter the fold.²²⁷

It is essential in cases involving multiple tortfeasors to determine who is under a duty to act, and this can prove a difficult task. The legislature can do its bit by providing clear guidelines as to who – in cases involving more than one liable party – the sufferer should select for compensation. This is what happens for example in Sweden where a person injured by virtue of an employee’s actions in the course of employment will normally be directed towards the

²²⁴ See Posner, *J. Legal Stud.* vol. IX (1980), from p. 529. For a critique of this position, see M. T. Katzman, *Joinder of defendants and induced innovation in environmental torts*, *Envtl. L.* vol. 19 (1988), from p. 37, at p. 40.

²²⁵ To the above mentioned words of Pierce (see above at note 167) we can add those words immediately following: “The judicial system cannot contend with causation problems in the context of consequences that have long developmental periods and whose etiology suggests the likelihood of joint causation. More generally, the tort system has extreme difficulty coping with statistical indications of causation. There are many circumstances in which a rational decision-maker can go no farther than to conclude, for example, that forty percent of accidents of the type at issue are caused by one factor and forty percent by another. In this large class of accidents, the judicial system typically externalizes accident costs by refusing recovery to the victim who, in turn, externalizes the bulk of the costs through first party insurance or social welfare programs” Pierce, *op. cit.*, at p. 1298.

²²⁶ Cf. Sugarman, *op. cit.*, at p. 36.

²²⁷ A contractual relationship between the injured party and a tortfeasor may to the contrary alleviate the injured party’s situation. Economic prevention may therefore make it pressing to impose tortious liability on one of the parties to the contract. A stricter liability for house-lords towards their tenants for harm caused by third parties has been suggested many a time in America; such liability is considered better equipped to meet the demands of prevention. See also M. J. Bazylar, *The Duty to Provide Adequate Protection: Landowners’ Liability for Failure to Protect Patrons from Criminal Attack*, *Ariz. L. Rev.* vol. 21 (1979), from p. 727, at p. 745, note 109: “With strict liability, there is no incentive for the landowner to take adequate preventive measures to prevent the attack (as there would also be under the duty standard), because even when the landowner does all that he can do to prevent the attack, he would still be liable if the attack occurred. Liability under such circumstances will not promote deterrence, and therefore should be rejected.”

employer by virtue of Chapter 3, Section 1 and Chapter 4, Section 1 of the Damages Act.

The right of recourse makes economic prevention even more elusive in cases of multiplicity than in cases of single tortfeasors. This would apply at least in cases of concerted action. Where all of the wrongdoers are aware that several people are drawn into the picture of liability and that this could therefore lead to diminished responsibility in the end, they may relax a little paying less attention to the preventative signals being transmitted.

Where all of the wrongdoers will be deemed liable in fault, they may choose to act as carefully as possible, in this way shifting the burden of recourse onto either wholly or in part. Landes and Posner also reason in this way, maintaining that “it will always be in the interest of at least one of the tortfeasors to behave carefully and thereby place the whole liability on the other; and once one behaves carefully the other has an incentive to do likewise”.²²⁸ An analysis carried out in the *University of Pennsylvania Law Review* (1983) also points down the same lines.²²⁹

Assume that wrongdoer A is extremely rich and that wrongdoer B is poor. If B were to presume that the sufferer X would not turn to him for compensation but instead to A for the entire amount, and that B anyhow will be able to get compensation back from A, then B’s actions will in all probability be negatively influenced by this fact. Inversely, the deterrent effect on A on the other hand will probably be high. To this end, the economic prevention will probably work in the same way as in cases of single tortfeasors when there is no concerted action.

Cases involving multiple tortfeasors thus illustrate the way in which many rules that – although when taken at face value would not perhaps be capable of achieving economic prevention – nevertheless do for some or other reason.²³⁰

When it came to reasoning for an extended general employer’s liability in the Swedish Damages Act, no room seemed to have been made for economic prevention; the theory of deterrence had yet to emerge in Swedish legislative moves.²³¹ The Swedish Supreme Court on the other hand was prepared to take “the preventative function of tortious liability” in relation to employer’s liability into serious consideration (NJA 1979, p. 773). The Court came in this way very close to the idea of economic deterrence.

Economic prevention does not seem to have had any impact either in relation to general liability for acts carried out by public servants in the preparatory works to the Damages Act.²³² The 1989 reforms have witnessed a change, however, as far as the relationship to prevention is concerned.²³³ When

²²⁸ Landes & Posner, *op. cit.*, at p. 196. Cf. Katzman, *op. cit.*, at p. 40.

²²⁹ From p. 160 (“(...) the common law rule providing that in multiple injurer accidents the risk of an injurer’s insolvency or absence lies with the other tortfeasors (the recovery rule) encourages potential injurers to take efficient levels of care”, at p. 170).

²³⁰ So Donohue III, in note 213 above *op. cit.*, at p. 1050, note 15.

²³¹ Cf. B. Bengtsson, SvJT 1987, at p. 417.

²³² Cf. B. Bengtsson, *Skadestånd vid myndighetsutövning I*. Stockholm 1977, at p. 31.

²³³ See Ds 1989:12, at p. 18. According to what is said here, it is “clear that a liability in tort for wrongful exercise of public authority may be a very useful tool in sorting out any deficiencies in public activities”.

Bengtsson pointed in 1991 to the ability of claims for damages to reveal breaches in the way in which the State and municipalities operate, he would have had prevention in mind, at least in part.²³⁴

3.3.4 Moral Prevention

3.3.4.1 General

Even if much remains unclear concerning the issue of economic prevention, this is nothing compared to the question of the other form of prevention in tort – moral prevention. Tort law experts from Sweden and abroad²³⁵ have for a long while now expressed their doubts concerning this type of prevention. Roos speaks of “the ideological theories, such as those propounded by Lundstedt and Ekelöf”. According to these writers, he says, “damages for example have a morality forming effect”. Roos is not soft in his judgment on this point: “The basis of the statement is purely ideological, or should we say wishful thinking.”²³⁶

It has also been stressed in the Swedish debate that the failure of prevention to make itself applicable in tort is more to do with reality. The constant development towards new watermarks in insurance and compensatory systems has had a negative effect on private individuals.²³⁷ In 1987, Conradi claimed that only on the rarest of occasions would a private firm or a private person have to actually make a payment for damages following personal injury. He continued:

“On the whole, one could say that when sanctions disappear in this way by shifting liability for damages back on large, anonymous and collective systems, most of the social pressure and morality forming in tort disappear too – not even the incentive to act carefully, as raised by the inherent risk that one otherwise

²³⁴ Bengtsson elucidated his views on damages and punishment in the context in the following words: “That I concentrate on liability in tort is dependent in part upon an evaluation. I believe that if it is to be a question at all of legal liability in these contexts, then it is this sanction that ought to be pushed to the fore. Apparently not all share the same opinion... But for me, the liability of the State or local community in tort stands out as the most appropriate sanction from a general point of view, in the wake of a wrongdoing on the part of the Authorities. In short, this is warranted not only by the fact that damages are obviously the sanction that an injured party would be most happy with, but also in another way. A claim for damages provides the possibility not only of making clear the wrongdoings of individual civil servants, but also more general breaches in the Authorities’ way of working. This in turn constitutes an important pressure element on the State or local community to improve the organisation of its activities. The punishment itself does not by far have the same beneficial effect in these regards.” NAT 1991, at p. 386. Along the same lines: Bengtsson, *Det allmännas ansvar enligt skadeståndslagen*. Stockholm 1990, at p. 23.

²³⁵ See e.g. F. James, *Social Insurance and Tort Liability: The Problem of Alternative Remedies*, N.Y.U.L. Rev. vol. 27 (1952), from p. 537, at p. 547.

²³⁶ C. M. Roos, SvJT 1987, at p. 418.

²³⁷ It has been pointed out in the international debate that schemes that compensate for criminal injuries may encourage criminal conduct; see R. Elias, *The Symbolic Politics of Victim Compensation*, Victimology, vol. 8 (1983), from p. 213, at p. 221.

might have to pay damages, remains. The demand for security on the part of both the injured party and the offender have replaced the liberal ideology that carries traditional liability in fault. This is evolution – for better or for worse.”²³⁸

Conradi found that the situation was the same in part concerning damage caused to property, even though the development in that sphere had not yet come as far. He drew attention to the influence and effect of “technique”. The question now when dealing with fault in tort was whether there had been a breach of a technical breakdown, and for this there would be no issue blameworthiness.²³⁹

3.3.4.2 Objections

The common test put in the front the person who had acted but yet not caused harm. Was this person’s irreproachable conduct a result of his or her fear of attracting tortious liability? The answer is no; the conduct was controlled by other motivations other than fear of an imposition of liability.²⁴⁰ The car driver, for example, does not drive carefully out of fear of attracting liability in tort but because he is scared of crashing and injuring himself.

Furthermore, when it comes to private persons, it is often stressed that the room for free choice between various alternatives of conduct presupposed by moral prevention is extremely small; this applies not least in cases of personal injury.²⁴¹ Several American studies have allegedly proved this point as early as before the 1950’s.²⁴²

Also the objection concerning liability insurance (see above) has come into favour in connection with moral prevention. It became an essential argument for the Minister of Justice in his rejection of moral prevention in the preparatory works to the Damages Act.²⁴³

²³⁸ Conradi, SvJT 1987, p. 415.

²³⁹ “This technical defect cannot in the same way as the old *bonuspaterfamilias*-norm grab onto the general moral understanding. That one has infringed a technical norm is certainly observed by the courts as carelessness, *culpa*, but is not observed as something immoral. It is almost like when one has overlooked some detailed, fiscal rule and is hit with a tax addition for it, or (more in a fairy-tale) found guilty by a court of negligent tax declarations – in wide circles, this is not deemed to be anything blameworthy”. Conradi, SvJT 1987, at p. 416.

²⁴⁰ See *e.g.* James, *loc. cit.*: “In the first place it is problematical just how much any civil liability effectively deters accidents. So far as individual participants in an accident are concerned, they often have the greatest incentives to be careful quite aside from any thought of civil liability”.

²⁴¹ So James, *loc. cit.*

²⁴² So *loc. cit.*, with reference to F. James & J. J. Dickinson, *Accident proneness and accident law*, Harv. L. Rev. vol. 63 (1950), from p. 769.

²⁴³ Prop. 1972:5, at p. 81: “The scheme according to which employees’ personal liability in tort towards third parties was only first automatically encompassed by the employers’ liability insurance during the 1950’s. This scheme signifies that the individual employee today is practically completely free from the risk of personally being imposed with liability in tort against third parties for harm caused in the course of employment. In practice, the liability insurance companies will exercise a right of recourse against an employee who causes harm only when he has caused harm intentionally or in a drunken state. Nevertheless, it has not, as far as is known, been claimed that the number of cases where an

The nowadays traditional Swedish approach is illustrated by way of the following example. Assume that a downhill skier (X) suddenly hits a bare patch on the slope and is severely injured. Assume further that an action brought by the skier results in a finding of negligence on the part of the owner of the slope but that it is established that X was contributorily negligent: he should not have been skiing as fast as he was. As X had not acted intentionally or grossly negligently, the damages would not be apportioned (Chapter 6, Section 1 of the Damages Act). The Tort Law Committee, whose bill Damages V (SOU 1973:51) provided the basis for the 1975 reforms that also led to the present day shape of Chapter 6, Section 1 of the Damages Act, did not agree with prevention:

“The argument sometimes put forward – that apportionment following contributory negligence is of value from the point of view of prevention – would be devoid of meaning, at least as far as personal injury is concerned. Even if a full award of damages is made, one would in general exercise the same amount of care to avoid being involved in an accident or contracting an illness.”²⁴⁴

Assume now, however, that X instead has obtained an award of damages which is subsequently apportioned leaving him with nothing. A good friend of his gets to hear of the judgment. Seen from the traditional Swedish approach, this friend would remain unaffected upon hearing the news, as he will not be thinking when out skiing himself that negligent conduct on his part would leave him effectively without an award of damages.

Against this line of argumentation one might claim that liability in tort does not need to be calculated. To the contrary. The good friend of X will not presumably be thinking of the absence of damages when out skiing. Nevertheless, a signal transmitted to him has reached him. It would seem reasonable to believe that this signal could influence his conduct, his instincts. Others than simply X’s friends may also receive the message that the judgment emits. The issue then becomes one of what we can term “indirect prevention”. It is our preconceptions of damages and the threat they pose us- not the award of damages itself- that becomes decisive.²⁴⁵

As expressed in one American case, a wrongdoer acts with a “complex combination of economics, morality and psychology”.²⁴⁶ Those reading a newspaper to find an individual held liable in tort for acting in a certain manner may come too preserve that information subconsciously for a long time. The

employee during the course of duty causes harm to third parties has increased during the last decade. Much seems to indicate that the tendency in a number of companies is the opposite”. But how is one to know that harms caused would not have increased if liability insurance had not entered the picture?

²⁴⁴ SOU 1973:51, at p. 239.

²⁴⁵ Cf. S. Wennberg, SvJT 1987, at p. 413, concerning criminal law: “The real threat of penal sanction is not of decisive importance, but rather peoples’ conceptions of this threat of penal sanction”.

²⁴⁶ *Cipollone v. Liggett Group Inc.*, 593 F. Suppl. 1146, 1150 (D.N.J. 1984). The quoted words may also be found reproduced in Phillips, *Ariz. L. Rev.* vol. 27 (1985) (in note 183 above *op. cit.*), at p. 612, note 79.

same goes for those acquiring similar knowledge in relation to contributory negligence. In reality we may therefore be dealing with an efficacy, an active influence, completely understated in the debate.

On the other hand, one can also raise the objection that the mass media do not always provide correct and adequate information concerning tortious issues. Such a negative contention is, however, difficult to defend. No news story will ever be one hundred percent accurate; a completely different thing is to claim the regulatory system as too complicated, and in need of simplification.

In more recent times such a sophisticated critic of tortious issues as John Fleming has also posed the question whether tort law still “does not perform a better, and sufficiently better, job of deterrence”.²⁴⁷ He provides no answer to his question, but understands it as key, placing it against the backdrop of the compensatory systems in New Zealand and the Swedish patient insurance.

In the criticism against the prevention theory one finds the argument that tortious liability must be determinable in advance,²⁴⁸ which is not always the case in the fluid world of tort. Roos states that for an older generation of legal theorists it was “almost a given that the risk of attracting liability in tort had a deterrent and injury preventative effect”.²⁴⁹ According to Roos, to one of the “gaps”²⁵⁰ revealed by later day scholars belonged the “condition that the person to be prevented by the threat of damages must be informed about liability and its limits.”²⁵¹ Roos also adopts a negative attitude towards the imposition of tortious liability for parents for damage caused by their children. He believes that an unfettered application of economic prevention would work against liability in such a case:

“Firstly, it is a precondition that the parent is informed of his or her tortious liability. As will be shown, it is not realistic to presume that people are generally aware of their situation under the law. One could reasonably expect the regulatory system in a static agricultural society to be well rooted in the community and its constituents, but one could hardly expect the same in a complex technical and information society such as ours”.²⁵²

The moral prevention referred to here is not, however, limited by the condition that the message has to be received directly – even though Roos’ view as set out above is considered particularly troublesome in relation to economic prevention. Instead, it is firstly a question of an indirect effect. Where the term damages appears in separate contexts, this may act as an indicator for people. Roos touches upon this point: “It has been stated that fathers and sons would be

²⁴⁷ J. Fleming, *Book Review*, Am. J. Comp. L. Rev. vol. 37 (1989), from p. 838, at p. 840.

²⁴⁸ See e.g. J. Ramberg, SvJT 1987, at p. 419: “When insurance is not present – for example, directors’ liability – the risk of damages may operate preventatively, under condition that the director is not only aware of the existence of the rule of tort, but is also conscious of the concrete situations it may be put into use”.

²⁴⁹ C. M. Roos, *Föräldrars ansvar för barnens skadegörelse*, Tidskrift för rättsociologi 1988, from p. 167, at p. 177.

²⁵⁰ *Loc. cit.*

²⁵¹ *Loc. cit.*

²⁵² *Op. cit.*, at p. 178.

brought together by the common economic problems the harm caused has given rise to".²⁵³ He refuses to accept this reasoning, drawing a comparison to Swedish family law and marriage, where the opposite path was taken: the tortious rules were eliminated here, leaving conflict resolution to non-legal procedures. Family relations lie on a different and deeper level than those to which economic prevention are applicable, which explains why the desired effects of tortious liability may not be achieved where relations of this kind are concerned.

Roos seems, however, to ignore entirely the reaction of the graffitist upon realisation that someone else, dear to him, may have to pay for his actions. The situation is not as in a marital relationship where the graffitist will make a payment to the parents. We are dealing with the issue of the parents paying third parties for what the graffitist has done.

The graffitist may through the parents' liability become fully aware of the close community that triggers such liability, thus bringing him closer to the parents.²⁵⁴

Another argument against underestimating the significance of moral prevention is that its effects are taken very seriously in other areas of the law—even though it is far from proven that any moral prevention whatsoever actually exists. Criminal law is one of these areas. Even if great uncertainty exists concerning the preventative effects of punishment, society will intervene with peculiar decisiveness against crimes (e.g. drunk driving), and this is done precisely with regard had to the general preventative effect.²⁵⁵

Doubts regarding the effect of moral prevention primarily concern harm caused due to carelessness.²⁵⁶ The situation is different where the damage is caused by an intentional act. The individual considering inflicting injury upon another will have time to afford prospective damages a thought to a greater extent than the careless individual will. To make a distinction in this connection between intentional and mere careless conduct may, however, comprise a simplification that does not always exist. The border between the two may indeed be very fluid.²⁵⁷

What has been discussed so far concerns orders of liability in tort. Whether, on the other hand, discharges of liability have any negative moral effects is not a

²⁵³ *Op. cit.*, at p. 179.

²⁵⁴ Roos does not seem, however, to be without any belief whatsoever in moral prevention. As a "modest proposal", he offers a counter-proposal to instead make the victim pay compensation to the graffitists. "The compensation would constitute remuneration for the graffitists for their daily reminder of our lack of flexibility, our pedantic attitudes and our attachment to unnecessary and insignificant securities. And to this end, the graffiti are a worthy effort. Perhaps the graffitists have an important message for us all: to open our minds to new influences and to youth's willingness to wholeheartedly be accepted in the adult world." *Op. cit.*, at p. 182. With slight exaggeration, one could say that Roos' idea is that the roles have been switched: the graffitist is the injured party, the victim is the wrongdoer. It is difficult to see more than that the compensation the that latter pays does not only have a reparative character; is not also preventative?

²⁵⁵ Cf. S. Wennberg, SvJT 1987, at p. 411.

²⁵⁶ Cf. P. O. Ekelöf, *Förhållningsregler och domsregler*. From: Festschrift tillägnad Karl Olivecrona, Stockholm 1964, from p. 166, at p. 183.

²⁵⁷ Cf. Phillips, in note 184 above, *op. cit.*, at p. 613.

question easily answered. In line with the contention set out above lies, however, that a full discharge of tortious liability, where such a liability was expected or deemed reasonable, may have the indirect effect of undermining confidence in the law as seen through the eyes of third parties or even the discharged individual himself. Although merely a general suspicion – and hardly one that could be proved empirically – it exists nonetheless, and cannot simply be ignored.²⁵⁸

Those backing prevention are surely not best pleased with grants of discharge from liability. Genevieve Viney directs a few concluding remarks against such grants of discharge. According to her, they risk favourising “la négligence et l’impéritie des débiteurs”.²⁵⁹ She underlines furthermore that such grants by no means bear any resemblance to liability insurance; unlimited compensatory amounts are seldom made out under this insurance,²⁶⁰ a device that also has the ability to influence policy holders’ conduct positively in various ways.²⁶¹

3.3.4.3 The Legislature

An air of scepticism surrounding moral prevention presented itself already in the preparatory works to the Swedish Damages Act.²⁶² At a time when thoughts concerning economic prevention had yet to penetrate the Swedish tort law debate,²⁶³ the Minister expressed the following – on a general note – in the Government’s bill:

“But a few decades ago, the general, widespread understanding was that the risk of attracting economic responsibility following negligent conduct should be perhaps the most important driving force inducing citizens to note the standard of care upon which the fault rule rests. Taken in a strict sense, this notion contains two elements. The first part is, that where a certain course of conduct resulting in an obligation to pay damages when harm has been caused to another, then the wrongdoer in the individual case will refrain from acting contrary to the tortious standard of conduct. The second part of the idea is, that tortious rules are

²⁵⁸ Roscoe Pound has summed it up in the following words: “Extreme extensions of the services rendered by the state have a significant effect upon the morale of the people. It is not so much that administrative imposing of the policies of bureau officials upon business and industry threatens the inventive initiative and adventurous enterprise that have been characteristic of Americans from the beginning. What is more serious is that the attempts to relieve pressure groups of liabilities which are imposed upon the rest of us confuses the whole relation of law and morals”. A.B.A. J. vol. 36 (1950), from pp. 977 and 1050, at p. 1050.

²⁵⁹ Viney, *La responsabilité: Effets*, in note 193 above *op. cit.*, at p. 255.

²⁶⁰ Cf. J. Huet, *Responsabilité du vendeur et garantie contre les vices cachés. Contrats civils et commerciaux*. Paris 1987, at p. 368.

²⁶¹ Viney, *loc. cit.*

²⁶² Cf. B. Bengtsson’s appraisal in SvJT 1987, at p. 417: “One can also see in the *travaux préparatoires* how the idea of prevention is toned down in various ways – even when it came to employees’ accounting liability, and conscripts’ liability for requisitioned material, but there the the Council on Legislation reacted”.

²⁶³ B. Bengtsson, SvJT 1987, at p. 417. Cf. also Dufwa, SvJT 1987, at p. 414.

generally moral formative, contributing in this way to societal cultivation of a system of standards of conduct that people will automatically adhere to without reasoning.

There would seem reason today to call the weight of these considerations into question...²⁶⁴

The Minister found it unlikely that the risk of attracting tortious liability in personal injury cases would have any preventative effect beyond the threat of penal sanctions.²⁶⁵ He did find, however, that such a preventative effect could not be ruled out entirely in relation to intentional damage to another person's property. The question of prevention became more difficult concerning damage flowing from careless conduct: "There is good reason to believe that the idea of a moral formative and preventative function performed by tortious rules is exaggerated in these cases."²⁶⁶ Thus, the conclusion was set out as follows:

"There is cause to believe that entirely different factors other than the risk of attracting liability in tort play a decisive role when it comes to preventing members of a society from transcending the boundary of acceptable conduct. Factors such as upbringing and education, extended knowledge and the formation of public opinion through mass media are probably of far greater importance as preventative instruments than the rules of tort."²⁶⁷

Statements of this kind cannot simply be overlooked. This statement constitutes a significant pronouncement of the reasoning behind the essential legislative act in tort.²⁶⁸ There is reason to believe that those seeking clues as to how to solve the various tortious problems – judges, authorities and others – hold such statements in high regard.²⁶⁹

The lack of faith in moral prevention is not limited solely to those traditionally regarded as belonging to the legal profession. Certain legal-economists claim that the abolition of tortious liability for personal injuries caused in traffic has proved an important factor in traffic safety.²⁷⁰

All this should not lead to the conclusion that moral prevention is "taboo" in all areas of tort law in Sweden. This form of prevention constitutes a significant ingredient in the award of one particular type of damages: compensation for non-economic loss because of an illegal strike action performed by an employee.

²⁶⁴ Prop. 1972:5, at p. 80.

²⁶⁵ For the following, see prop. 1972:5, at pp. 80-81.

²⁶⁶ Prop. 1972:5, at p. 81.

²⁶⁷ Prop. 1972:5, at p. 81.

²⁶⁸ Prop. 1972:5 at p. 78. The statements are made under the heading "Headlines of the reform work".

²⁶⁹ For a different opinion, see B. Bengtsson, SvJT 1987, at p. 417; according to him, the propositions scepticism towards prevention would nevertheless come to bear weight when the rules on contributory negligence were reformed in 1975.

²⁷⁰ See R. I. McEwin, *No-fault and Road Accidents: Some Australasian Evidence*, Int'l Rev. L. & Econ. Vol. 9 (1989), from p. 13. (One of the conclusions drawn is: "Overall, the results of a more comprehensive empirical study than so far attempted suggest that the abolition of the right to sue for personal injury loss is an important factor in promoting road safety", at p. 23).

Awards of this kind are distinctive to tort law and come close to imposing a punishment on the liable party.²⁷¹

3.3.4.4 Case Law

Direct and clarifying statements of a more general nature concerning moral prevention in tort are difficult to find in the case law of the Swedish Supreme Court. Presumably there is a distinction made between cases involving personal injury claims and those relating to damage to property.

The issue is brought to the fore particularly in relation to deliberately performed crimes. NJA 1990 p.196 – a case concerning an apportionment of an award under Chapter 6, Section 2 of the Damages Act – belongs to the category of personal injury cases. The Supreme Court held that apportionments following assault and battery might “appear dubious from the point of view of prevention and sometimes directly offensive”. For an example of a case of property damage in this respect we can turn to NJA 1987, p.376, another case that arose following an intentional act. The issue here was whether, according to the rule on economic apportionment *cf.* 2.2.2.1. above, an apportionment could be made to the benefit of an 18-year old that had committed theft and caused material damage. The theft comprised the taking of a radio transistor and a set of keys whilst the damage was caused by leaving a tractor engine ticking over in a garage. Three of the five Supreme Court Justices refused to excuse the crime from the apportionment point of view:

“The issue at hand concerns deliberate crimes for which the risk of substantial damages must have appeared apparent. Indeed [A] was only 18 at the time the offence was committed and his conduct – especially his action in leaving the tractor’s motor running – stands out as immature and unpremeditated. It is nevertheless an issue of an action of the reckless sort, one that in society today gives rise to great economic damage to both the public at large as well as to specific individuals. The suffering housing foundation seems to be capable of bearing the limited losses inflicted in this case without posing too great a burden on the tenants. Seen in a wider connection, however, it appears urgent nonetheless for public utility housing undertakings to ensure that in each individual case losses for the damage sustained can be obtained from the offender to the greatest extent possible.”

Two dissenting Justices arrived at the complete opposite conclusion:

“Concerning the nature and extent of the harm caused, it is indeed true – as pointed out by the housing foundation – that the effects of the damage could have

²⁷¹ Edvard Nilsson, the Swedish expert in this area, claims: “The general damages, however, retain the feature common to, for example, fines or contractual penalty that they – besides making out compensation for intangible harm- have a characteristic preventative function. With slight exaggeration (see above) one could say that general damages in practice serve in part as a kind of penal sanction of private law. The awards of damages made out are also often mistaken in the general debate as fines, above all in cases involving damages for participation in an illegal industrial action.

Especially striking are the preventative features of general damages when awarded for infringements of legal or collective contract rules having the character of safety rules or work regulations.” Nilsson, *Ideel skade – erstatningsret og erstatningsniveau*. From: Det 32. nordiske juristmøde i Reykjavik 22.-24. August 1990, from p. 105, at p. 140. See also at p. 146.

been worse under less favourable conditions. On the other hand, it is not correct to say that injurious actions themselves are characterised by a lust for vandalism or recklessness otherwise not an uncommon trait found amongst many youths today. The action in relation to the tractor that caused the worst damage seems to have occurred because [A] wanted to use it illegally – not to bring about any serious damage.”

3.3.4.5 Multiple Tortfeasors

The situation regarding the issue of moral prevention would seem to be the same in cases involving both multiple and single tortfeasors. A distinction may possibly arise in the case of intentional joint acts. An individual who gets mixed up in the actions of a group may feel less responsibility and thus be less receptive to preventative signals.

Roos is not the only one to have discussed parental liability for acts carried out by their children. Even Bengtsson has ventured into this arena, expressing a sceptical attitude towards the imposition of strict liability for parents whose younger children cause damage. By younger children he probably means children old enough to go to school, but not infants. The moral responsibility that parents bear for their children’s actions would above all concern infants according to Bengtsson.²⁷² Nevertheless, such a presumption is by no means a certainty. It might very well be the case that a parent feels a greater moral responsibility for the actions of an older child than those conducted by a younger sibling; the blame placed on oneself for a neglectful upbringing of the older child can make itself felt just as much as the self criticism following the younger child’s unpredictable action.

Just as in the case of deterrence, moral prevention will probably have less reach through recourse than when dealing with the duty of care owed to the injured party. In Swedish legislative moves in this area it has nonetheless once been stipulated that prevention would bear significance. This was in relation to the introduction of the Damages Act. A Court of Appeal (Svea Hovrätt) made it clear that a rule in the Criminal Law Act concerning a child’s right to full recourse against faulty guardians ought to be preserved for preventative reasons.²⁷³

²⁷² See B. Bengtsson, *Book Review*, SvJT 1971, from p. 130, at p. 135; *ibidem*, *Om ansvarsförsäkringens betydelse i skadeståndsmål*, SvJT 1961, from p. 627, at p. 628. It is not difficult to discover a generally critical line towards prevention in Bengtsson’s writings as a whole; more randomly we can refer for example to his book review in TfR 1963, from 319, at p. 321. Prevention is nevertheless accepted by Bengtsson in certain connections, for example when it comes to public servants’ right of recourse against their employers (see Bengtsson, *Skadestånd vid myndighetsutövning*. Stockholm vol. II. 1978, at pp. 240, 262 and 284) or concerning environmental harms.

²⁷³ In its answer to the Insurance Committee’s bill (SOU 1989:88) Indemnity Insurance Act, the same Court found that insurers’ right of recourse should be retained, even against private persons.

3.3.5 Distribution

3.3.5.1 General

Many economists consider there to be a greater risk of economic disorder resulting from taking a larger sum of money from one single person than taking several smaller amounts from several different people.²⁷⁴ Damages can be viewed in the same way, which will be easier to bear if spread amongst many people. Combined with the economic prevention, the spreading of risk is considered an important means in reducing the costs resulting from injury.²⁷⁵

The gospel of distribution has been preached especially in America where it is considered to constitute the most fundamental cause of tort's expansion from the 1960's onwards.²⁷⁶ Distribution through the rules of tort became the escape route exploited by judges who found the National Security Insurance scheme too underdeveloped.²⁷⁷ They drew support from pronouncements of various legal theorists dating back to the 1950's, not least from Fleming James.²⁷⁸ Looking for an early example, we can point to workers compensation.

A distinction has sometimes been made in the American debate in tort between the corrective and the distributive function of compensation. The former is regarded as pertaining to damages, and the latter to what is made out from National Security Insurance.²⁷⁹ However, this distinction embraces a not altogether accurate simplification.²⁸⁰ Damages also have a distributive function, not least by virtue of third party liability insurance.

The distributive function of damages has been emphasised even in Europe.²⁸¹ Distribution is aptly recognised in Swedish legislative work in the field of tort. Evidence of this is witnessed through the 1975 reforms to the rules on contributory negligence. The report made the following, unembellished

²⁷⁴ On this topic, see Calabresi, *op. cit.*, p. 39, with further references.

²⁷⁵ See *loc. cit.*

²⁷⁶ See *Reporters' Study on Enterprise Responsibility for Personal Injury* vol. I, in note 163 above *op. cit.*, at p. 28.

²⁷⁷ *Loc. cit.*

²⁷⁸ *Cf. op. cit.*, at p. 28, note. 45.

²⁷⁹ More randomly we can refer to W. J. Blum & H. Kalven, Jr., *The Empty Cabinet of Dr. Calabresi. Auto Accidents and General Deterrence*, U. Chi. L. Rev. vol. 34 (1967), from p. 239, at p. 268; S. Stoljar, *Accidents, costs and legal responsibility*, Modern L. Rev. vol. 36 (1973), from p. 233, p. 234; and P. Schuck, *Agent Orange on Trial Mass Toxic Disasters in the Courts*, Cambridge (Massachusetts), London 1987, at p. 4.

²⁸⁰ See also Stoljar, *op. cit.*

²⁸¹ See *e.g.* from French doctrine the following statement by P. Esmein, in his article *Le nez de Cléopâtre ou les affres de la causalité*, D. 1964.Chron. XXX, from p. 205, at p. 216: "La responsabilité civile opère une redistribution de la charge des dommages, comme aujourd'hui on utilise et aménage l'impôt en vue d'une redistribution des revenus. Dans la mesure où la responsabilité n'est pas une peine, l'idéal d'une société bien organisée serait la répartition de la charge entre tous les membres de cette société."

confession; “Accessible economic resources are best utilised where the risks of injury in society are spread out amongst as many people as possible.”²⁸²

The distributive function of tort must as a matter of course be taken seriously and then be seen in its wider connections²⁸³. That said, distribution should not be exaggerated.²⁸⁴ It may not prove to be an ally but rather an enemy of economic prevention.²⁸⁵ It may also prove to position itself in opposition to public values. Roscoe Pound²⁸⁶ disapproved of the reasoning employed by Judge Taylor in a case involving a Coca-Cola bottle that exploded causing injury to a waitress. She awarded damages on the grounds that “the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business”. Pound believed this argumentation to be “specious” and a “variant of Marxian axiom”.²⁸⁷

It is common in both the Swedish and International debate to point out two ways in which damages can be distributed or spread. Firstly, an insurance can have this effect. To the above mentioned statement in the report concerning the 1975 reforms to contributory negligence, the author’s immediately added: “Where a full amount of damages is made out, this often leads to an acceptable spreading of risk as the damages in most cases are covered by third party liability insurance”.²⁸⁸

282 Prop. 1975:12, at p. 131, and NJA II 1975, at p. 554.

283 See G. Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, Yale L. J. vol. 70 (1961), from p. 499, at p. 499: “But to say “risk distribution” is really to say very little. Indeed, under the heading “risk distribution” have come the most diverse schemes for allocating losses, schemes that have almost nothing to do with each other”.

284 See the criticism in this regard directed at Fleming, *An Introduction to the Law of Torts*, Oxford (1967), in A. Harari, *Book Review*, Is. L. R. 1970, from p. 135 (“He seems to take it for granted that it is always desirable to spread or distribute such losses; and this not so much because there are always many parties who for one reason or another ought to bear these losses, but rather because they should not be borne by any particular party”, at p. 150); see also Fleming’s contribution set out in the article *More thoughts on loss distribution*, Osgoode Hall L.J. vol. 4 (1966), from p. 161, from which the great role he accords the spreading effect appears clearly. Just criticism from the same point of view may also be directed at Pierre Tercier concerning his important article *Cent ans de responsabilité civile en droit Suisse*, published in *Hundert Jahre schweizerisches Obligationenrecht* in 1982. It is said here: “Il importe dans toute la mesure du possible que le poids de la réparation soit réparti sur le plus grand nombre, en fonction de la part prise à la réalisation des risques” (at p. 225).

285 See Harari, *op. cit.*, at p. 151.

286 According to Albert Kocourek in 1947, “the greatest figure in the field of law and jurisprudence in the English speaking world”. Kocourek, *Roscoe Pound as a former colleague knew him*. From: *Interpretations of modern legal philosophies. Essays in honor of Roscoe Pound*. Ed. by P. Sayre. New York 1947, from p. 419, at p. 429; also quoted in A. A. Ehrenzweig, *A Psychoanalysis of Negligence*, Nw. U.L.Rev. vol. 47 (1953), from p. 855, at p. 858, note. 13.

287 Pound, *Law in the Service State: Freedom versus Equality*, A.B.A. J. vol. 36 (1950), from pp. 977 and 1050, at pp. 981 and 1050. See also Ehrenzweig, *op. cit.*

288 Prop. 1975:12, at p. 131, and NJA 1975, at p. 554.

The second way is where the subject of liability is so strong that it can pass the losses on itself. Enterprises, the State and the municipalities are examples of subjects that possess such capability.²⁸⁹

There is a third way too, however, through which a distribution may occur: by imposing liability on multiple tortfeasors.

3.3.5.2 Multiple Tortfeasors

The case of multiple tortfeasors holds a unique position when it comes to the distributive function of damages. It is only in such a case that damages may be spread from the very outset amongst many people. No general obstacles are put in place by the legal order here, either. It is true that Swedish Courts have the power to concentrate hearings of cases brought against multiple tortfeasors into one trial, but the Court lacks the opportunity to prevent a large number of respondents in certain trials. The outermost barrier to distribution thereby becomes the costs involved.

The rules facilitating distribution touch upon all of the three main issues concerning multiple tortfeasors: the conditions of liability (see 3.3.5.2.1 below), the type of liability (see 3.3.5.2.2 below) and recourse (see 3.3.5.2.3 below). These shall be examined in turn below.

3.3.5.2.1 Conditions of Liability

3.3.5.2.1.a General

The layperson would hardly take it as given that others than the person who has directly caused damage might be held liable for the harm caused.²⁹⁰ Nevertheless, such liability may well arise, and the rules are so edified that nothing prevents a large number of individuals from attracting liability for the same damage. These constitute our two immovable starting points. The clearest expression of the inherent distributive force of the rules is contained in the principle that the harm needs not to have been caused by just one cause. Multiplicity of causes (*Mehrheit von Ursachen*, *pluralité de causes*) is a reality.

Above all, the distribution that occurs by virtue of the conditions of liability can be explained by regard for the victim. Where, for example, a liable party lacks third party liability insurance, is insolvent or simply refuses to pay, an advantage lies in being able turn to another liable person for compensation. The more persons deemed liable, the greater the assurance for the injured party that he will get paid.

It is possible that there is a general tendency in different legal systems to spread liability.

²⁸⁹ Cf. Calabresi, *op. cit.*, p. 39, and J. Hellner, *Skadeståndsrätt*. 4th ed. 1985, at p. 33.

²⁹⁰ Cf. O. W. Holmes, Jr., *Agency*, Harv. L. Rev. vol. 5 (1891) from p. 1, at p. 14, where the author maintains that “common sense is opposed to making one man pay for another man’s wrong, unless he has actually brought the wrong to pass according to the ordinary canons of legal responsibility.”

3.3.5.2.1.b Legislative Work

3.3.5.2.1.ba Legislation

During the preparatory work to the Swedish Damages Act, the Minister certainly criticised the flaws inherent in the system of third party liability insurance. It was this insurance, however, that ultimately rendered many of the reforms carried out possible, and the ability of insurance to spread damages was emphasised.²⁹¹ As we have seen, the distributive function of damages was also highlighted in the 1975 reforms to the rules on contributory negligence.

Since that time, the development of product liability in the hands of the legislature illustrates how a widening of the scope of liability can be effected. Beyond the heightened liability producers now face, other liable individuals have also seen the introduction of strict liability imposed against them – such as importers, trademark holders and those responsible for anonymous products under the EC Directive 1985 and, for Sweden, the Product Liability Act (1992:18). In addition, as far as Sweden is concerned, vendors are placed under a duty to inspect for damage to goods according to the Consumer Purchases Act (1990:932). A similar duty was introduced at the time by way of amendment to the Consumer Services Act (1985:716) regarding manufacturers that provide services.

Another area that illustrates how the scope of liability for a particular type of damage may be widened was the Swedish Environmental Harm Act. The Act placed more persons under strict liability than previously. On the other hand, the reasoning put forward in the legislative proposals shows that such a widening of the scope will not occur that easily. They stress the increased difficulties faced by industries, and that this could be one reason why not to increase their costs.²⁹² It was pointed out that the economic situation could justify restraint in shifting the costs to new groups.²⁹³ “One should avoid interventions that in an already difficult situation upsets the economic estimates of individual undertakings”.²⁹⁴

International developments in the areas of product liability and environmental harm have not reached the same results as within the field of nuclear liability, remaining far from a channelling of liability.²⁹⁵

²⁹¹ “Liability insurance also leads to an altogether desirable spreading of the costs for reparation of harms, and thereby neutralises certain negative effects of the rules of tort.” Prop. 1972:5, at pp. 88-89.

²⁹² SOU 1983:7, at p. 130.

²⁹³ SOU 1983:7, at p. 130.

²⁹⁴ SOU 1983:7, at p. 130.

²⁹⁵ Jacques Deprimoz, in *La réparation des dommages catastrophiques*, at p. 110, claims that: “Mais on ne peut totalement céder au raisonnement par analogie avec le nucléaire, car la pollution non nucléaire peut s’inscrire dans un scénario d’interventions ou des défauts d’intervention beaucoup plus complexe. Chaque intervenant devrait rester responsable de ses actes et les assureurs soutiennent ce point de vue.

En conclusion sur ce point, on peut dire que la canalisation juridique de la responsabilité civile sur la seule tête de l’industriel exploitant l’installation où la pollution a pris naissance serait sans doute assez mal accueillie si elle devait interdire toute action récursoire justifiée par les circonstances de l’accident.”

3.3.5.2.1.bb Legislative Proposals

There may exist a general tendency in legislative errands that seeks to widen the scope of liability without this fact being apparent from the legal text itself. One example of this is contained in statements made by experts on nuisance in the preparatory works to the Environmental Harm Act (1969:387).²⁹⁶ In these statements Swedish rules applicable in cases involving multiple tortfeasors are equated to a great extent with joint or several liability, a liability that thus overshadows the question of the conditions of liability. One may well enquire as to which rules are concerned here. The experts themselves probably intended the courts to work this out; of course, a court that examines such a statement may be influenced to relinquish a certain prerequisite in order to impose joint and several liability in a case involving multiple tortfeasors.

Another example can be drawn from the field of product liability and the considerations of the Committee on Product Liability relating to compensation for harm caused by pharmaceutical products (SOU 1976:23). The Committee wanted to let the proposed compensatory system cover even harm that arises after the delivery of the product due to changes to the directions of use or to the product itself. The Committee stated that the application of the proposed drug insurance scheme should be made easier if the covering of the system became wide.²⁹⁷ This statement works towards a generous application of the rules as far as the victim is concerned. A counterbalance promoted by the Committee, which was aimed at mitigating such a practice, was the possibility of recourse. This alternative was, however, formulated in a reserved or cautious manner.

This trend of widening the scope of liability is certainly not a Swedish domestic phenomenon alone. The English Pearson Commission found in 1978, concerning a strict product liability, that “the more widely liability is spread, the more certain the remedy is likely to be”.²⁹⁸

3.3.5.2.1.c The Courts

3.3.5.2.1.ca USA- General

The willingness of courts to widen the scope of liability is evidenced by the situation in America. Distribution in its most extreme form in America is witnessed through cases involving multiple tortfeasors, such as *Hall v. Du Pont Nemours & Co. Inc.* (1972) and *Sindell v. Abbot Laboratories* (1980).²⁹⁹ These cases have above all else afforded the greatest possibilities for further developing American tort. The injured party selects the party best suited to compensate, even where the conditions for liability are not so great. The jury contributes to modifying the rules of the game by accepting tortious liability even in cases where it would otherwise be dubious to do so.

²⁹⁶ SOU 1966:65, at p. 287.

²⁹⁷ SOU 1976:23, at p. 64.

²⁹⁸ Pearson Report I, in note 113 above *op. cit.*, no. 1241.

²⁹⁹ Cf. J. G. Fleming, *Is There a Future for Tort?* Austral. L. J. vol. 58 (1984), from p. 131, at p. 138, note 44.

3.3.5.2.1.cb Strict Liability

The introduction of strict liability by the judiciary may involve widening the circle of liable subjects. This was the case for example in NJA 1977, p. 538, where an importer was deemed liable in tort for the offence of the manufacturer.

Even where a new type of liability emerges, the result is a widening of the scope of liability. Partners of a limited company are in principle relieved from personal responsibility for payment of the company's debts. Nevertheless, Swedish case law has seen the imposition of liability in such cases; this has occurred only in a few rather special cases where it was not considered acceptable to uphold the principle of freedom from personal liability.³⁰⁰ Albeit that such breakthroughs of liability once held a great deal of interest in Swedish legislative work, they have now been removed from the legislative agenda.³⁰¹ This does not mean that the courts are prevented from adopting such a course of action even in the future to facilitate a widening of the circle of liable subjects; although the question is indeed one usually understood as pertaining to the field of company law, it nevertheless holds a significant tortious interest, too, and it may well prove to be better treated in the future with the tortious orientation in mind.

3.3.5.2.1.cc Other

Beyond the trends and cases set out above it is difficult to find further examples of Swedish or other courts' willingness to increase the number of persons to be deemed liable in tort. Nonetheless, the reality of such an increase coming to pass in the long term cannot be ruled out.

3.3.5.2.1.d Doctrine

3.3.5.2.1.da General Trends

We also find statements in international tortious doctrine indicating tendencies towards widening the scope of liability. In Atiyah's "Accidents, Compensation and the Law", in the chapter entitled "Defendants: Part I"- following an analysis of the situation where the wrongdoers are employees or companies- went on to say:

"One lesson which might be deducted from all this is that multiplication of possible defendants often does good, and rarely does harm. The more possible defendants there are in law, the greater is the chance that one of them will be able to compensate the plaintiff, or will be insured; whereas if none is in this position no great damage is done because several impecunious defendants can no more be ruined than one".³⁰²

³⁰⁰ Among these we find NJA 1947, p. 647, and NJA 1982, p. 244. See dir. 1991:98. On the topic, see especially K. Rodhe, *Moderbolags ansvar för dotterbolags skulder*. From: *Festskrift till Jan Hellner*, from p. 481.

³⁰¹ See SOU 1987:59, and dir. 1991:89, by virtue of which the Companies' Committee received the task of providing proposals for rules on liability break-through. This task has been taken away from the Committee, however, by virtue of dir. 1991:98.

³⁰² Pp. 219-220. The formulations were exactly the same in P. S. Atiyah, *Accidents, Compensation and the Law*. 3rd ed. 1980, at p. 257, although here with the addition that the

Even the assertions of more traditionally minded legal theorists can run along the same lines. Extended liability will usually be “mitigated” in a sense by mere reference to the possibility of recourse between the wrongdoers; the border between the conditions of liability and joint or several liability in this way becomes blurred. For an example of this, we can refer to the argumentation exacted by Bianchi, a Swiss environmental law expert. Bianchi criticised a number of his Swiss colleagues’ propositions that sought to free a person from tortious liability for harm caused by another individual’s intervening action:

“Nous l’avons déjà souligné, un accident n’est que rarement le résultat d’une seule cause. La rupture de la chaîne causale ne doit être admise que parcimonieusement. Le défaut est bien réel, il n’est pas dû aux agissements d’une tierce personne comme dans l’hypothèse précédente et le propriétaire doit en répondre. Il a néanmoins la possibilité de se retourner contre un tiers responsable pour une part du dommage”.³⁰³

Certain German legal theorists provide another example, characterising the development in the area of environmental harm under German law:

“Im Bereich der Umwelthaftpflicht is man daran, nach dem Vorbild der US-amerikanischen “marketshare liability” die Haftung für summierte Immissionen und addierte Teilkausalität zu bejahen. Ansatzpunkt hierfür ist eine exzessive Interpretation der Solidarhaftung gemäß § 830 I 2.”³⁰⁴

As can be seen, the suggested route to be taken is principally a widened application of the maxim of joint and several liability. Similar statements can be deduced from French legal doctrine. Viney has recommended widening the application of “l’obligation *in solidum*”. Suggestions of this kind do not necessarily involve affecting the conditions of liability. However, such a result *may* actually occur in reality. All depends on which interpretation a judge gives to the principle of joint and several liability in the case at hand. Where the principle is understood as involving a question of the imposition of liability, and not merely as a question of what kind of liability, then the principle will be also be capable of being exploited to this end.

It is indeed far from certain whether or not these authors intended joint and several liability to be used as a condition of liability. They may simply have meant that the principle should be afforded a certain precedence in dubious cases where a shared liability may come into question. Nevertheless, their assertions might leave room for misinterpretation. This is especially the case where they are unclear, something that is illustrated well in the following extract from *Aubry et Rau* (1975):

statement in no. 4826 above of the Pearson Commission was inserted between the first and second opinions in the quote.

³⁰³ Fr. Bianchi, *Pollution atmosphérique et droit privé. Etude des moyens d’action contre la pollution atmosphérique en droit privé*. Lausanne 1989, at p. 208.

³⁰⁴ T. Honsell & F. Harrer, in note 5 above *op. cit.*, JuS 1991, from 441, at p. 442.

“La règle selon laquelle les coresponsables sont tenus pour le tout reçoit donc, de nos jours, une application très étendue. Peu importe que la responsabilité soit fondée ou non sur la faute, ou même que son fondement soit différent à cet égard pour les divers responsables, qui peuvent être respectivement tenus de leur fait personnel, du fait d’autrui, du fait d’une chose. Peu importe également que la responsabilité soit contractuelle pour l’un, délictuelle pour l’autre”.³⁰⁵

The first assertion may give rise to the understanding that one is alluding to the conditions of liability in cases of involving multiple defendants. The other two assertions provide no support whatsoever to the making such an assumption. They may simply aim at the principle of joint and several liability; it may seem reasonable – when noting that liability is joint or several- also to point out that this would be the case even where the conditions of liability the wrongdoers are answerable to, vary. On the other hand, these two assertions may also bear reference to the conditions of liability. All depends on what the first assertion is alluding to. And this, as we have seen, is not clear.

It is not unusual in the international discussion that the widening of the circle of liable subjects is defended with the argument that recourse will still give rise to an ultimate channelling of the liability to a certain subject. An objection that can be raised in response is that such an argument is purely hypothetical. Not only does it require that the person ultimately called on to compensate can be reached, but that person must also be able to pay.

3.3.5.2.1.db Reality

Claims have been made in international legal doctrine that the number of tortious suits brought against several persons has increased as a consequence of the development of tort law.³⁰⁶ Legal representatives must be regarded as being under a duty in tortious disputes to consider whether or not a case of multiplicity exists.³⁰⁷ However, as studies have yet to be conducted to this end, the verdict of such considerations and the final outcome are unbeknownst.

3.3.5.2.1.dc USA: Failures or Omissions to Act

In most American states,³⁰⁸ a failure to act when another person is put at risk of injury will not give rise to tortious liability – even where that danger is realised

³⁰⁵ Aubry & Rau, *Responsabilité civile par N. Dejean de la Bâtie. Ouvrage incluant l’apport de P. Esmein*. Droit civil français. 8e éd. Paris 1989, pp. 604-605.

³⁰⁶ See e.g. concerning professional liability Jackson & Powell on *Professional Negligence*, ed. by R. M. Jackson, J. L. Powell and others. 3rd ed. London 1992, at p. 354, no. 4-74 (“Developments in the law of tort have led to a growth in the number of claims which are made against more than one professional adviser”; the statement is directed more generally, but inserted in connection to the discussion on the liability of solicitors.)

³⁰⁷ Cf., Glanville Williams’ advice to those working with tortious problems: “As in criminal law, look for all the possible torts that may have been committed, and consider whether their essentials have been satisfied. Draw into your net all possible defendants, and then turn round and consider all the possible defences open to them on the facts given.” Williams, *Learning the Law*. 11th ed. London 1982, at p. 138.

³⁰⁸ Vermont and Minnesota are among the exceptions to this, according to R. J. Lipkin, *Beyond good Samaritans and moral monsters: An individualistic justification of the general legal duty to rescue*, UCLA L. Rev. vol. 31 (1983), from p. 252, at p. 253, note 17.

and injury occurs.³⁰⁹ Members of American society are not placed under any duty to act as the Good Samaritan.³¹⁰ This feature of American tort law fell victim to insistent criticism throughout the 20th century.³¹¹ The arguments forwarded in this vain claim not only that the imposition of a duty to rescue would contribute to lowering accident costs, but would also be in unison with the individualistic approach that characterises American tort.³¹²

One of the problems that arises as a result on introducing liability for failures to act is the difficulty of establishing who shall be held responsible.³¹³ The issue has by no means been viewed as an impractical one in American doctrine – it has arisen in many cases involving astonishing and, frankly, shocking passivity.³¹⁴ In one case, a woman called Kitty Genovese was murdered outside the apartment building where she lived. 38 people witnessed the murder from their windows without calling the police. The murderer assaulted her three times during the course of 45 minutes. It was not before she was actually killed that a neighbour finally notified the police. In an attempt to excuse their passive behaviour, the neighbours explained that they did not want to get involved; one even stated that he had been woken up the disturbance, but had not wanted to interrupt his rest.³¹⁵ Who should be held liable for failing or omitting to act in such a case?

The problem of identifying a tortfeasor here has become an argument for dropping liability in such cases. It has been argued that it is meaningless to place rescuers under a duty when they are not readily identifiable in the first place.³¹⁶

³⁰⁹ *Op. cit.*, p. 253 and Prosser & Keeton *on the Law of Torts*, 5th ed. St Paul, Minn., at p. 340.

³¹⁰ *Cf.*, A. M. Linden, *Tort Liability for Criminal Nonfeasance*, Can. B. Rev. vol. XLIV (1966), from p. 25, at p. 25: “The common law has treated the Good Samaritan with uncommon harshness over the years, while the priest and the Levite have been treated with uncommon generosity”.

³¹¹ See already J. B. Ames, *Law and Morals*, Harv. L. Rev. vol. 22 (1908), from p. 97, at p. 112, and from later times, Lipkin, *op. cit.* (“Anglo-American law is now ready to fulfil its individualistic heritage by recognizing a general duty of easy rescue. A comprehensive understanding of individualistic values – most notably, autonomy and self-interest – suggests, therefore, the propriety of legally requiring easy rescue”, at p. 293; the term “easy rescue” is set out by E. J. Weinrib in *Yale L.J.* vol. 90 (1980), at p. 250, and involves intervention being able to happen without difficulty and at minimal cost).

³¹² See *op. cit.*, at p. 258.

³¹³ See *op. cit.*, from p. 270.

³¹⁴ In *Osterlind v. Hill*, 263 Mass. 73, 160 N.E. 301 (1928), A had rented out a canoe to B who was under the influence of drink. The canoe overturned, and B was left hanging on to the side crying out for A’s help for half an hour. A refused to intervene, and B died. A was freed from liability in tort, see a critique of this decision already in the Case Comment, *Harv. L. Rev.* vol. 42 (1929), from p. 964. In *Union Pac.Ry. v. Cappier*, 66 Kan. 649, 772 P. 281 (1903), a boy’s leg and arm had been chopped off at a railway station. Several railway attendants witnessed the accident without calling for a doctor; the boy bled to death before their eyes. In another case, a woman was raped in a bar whilst several people watched; no one called for the police. *Cf.*, Lipkin, *op. cit.*, at p. 270. See further Prosser & Keeton, *op. cit.*, at p. 340.

³¹⁵ See Lipkin, *op. cit.*, at p. 270.

³¹⁶ *Op. cit.*, at p. 272.

One way of avoiding the entire problem, however, would be to view the omitters as joint tortfeasors.³¹⁷ Yet even this solution has its sticky points. When someone has drowned in the sea, it has not been considered sufficient to have merely been present on the beach in order to attract liability.³¹⁸ There must be limits to liability, and this can prove problematic. Various criteria for delimiting the scope of liability have been suggested, one of them being where a “special relationship” exists between the liable party and the sufferer.³¹⁹

One objection raised against joint liability to the extent envisaged directly above is that rescue operations are made more difficult. In order to discharge their own potential liability, we can imagine hordes of people attempting the same rescue, making the actual rescue all the more difficult.³²⁰ Of course, the argument that then follows is that a rescue operation would have more likelihood of success where more people are involved.³²¹

On the whole, however, it has been stressed that an imposition of liability on several people on a beach would not prove insurmountable, as one could ensure that only persons conscious of the danger that could have acted but failed to do so would be held liable.³²² This seems to be the line most wish to be taken in the future – albeit that though no general consensus has been reached in the debate. In case law the matter does not seem to have been brought to a head.

3.3.5.2.2 The Principle of Joint and Several Liability

A person held liable in tort may be required to make out compensation either in whole or in part. The principle of joint and several liability provides the injured party with the power to effect a spreading of liability as he or she sees fit. By allowing the sufferer to bring about a distribution of liability in a way that reflects the right of recourse of the tortfeasors, recourse may be completely invalidated.

³¹⁷ One proponent of this route is T. M. Benditt, *Liability for Failing to Rescue*, Law & Phil. vol. 1 (1982), from p. 391, at p. 410; reservations nevertheless exist in the taking of a standpoint here.

³¹⁸ Cf. Lipkin, *op. cit.*, at p. 272.

³¹⁹ Cf. Benditt, *op. cit.*, at p. 415: “[F]or some relationships and for some matters involving these relationships, it is plausible to regard one individual as a partial guarantor of another’s welfare or well-being, such that if he fails to (at least try to) rescue he must make the victim whole. [O]ne person is a guarantor of the welfare or well-being of another only when (1) there is a relationship established prior to the event in question, which is either (a) voluntary, or (b) familial, or (c) involves some professional or official capacity, and (2) the event in question is connected with the relationship”.

³²⁰ Cf. R. L. Hale, *Prima facie torts, combination and non-feasance*, Colum. L. Rev. vol. 46 (1946), from p. 196, at p. 215: “Moreover, if there are several passers-by, each capable of rescuing the drowning man, it cannot be the legal duty of *all* to do so. If all attempted, they would get in one another’s way, and fall in the attempt”.

³²¹ *Loc. cit.*

³²² Cf. A. M. Linden, Can. B. Rev. vol. XLIV (1966) (in note 310 above *op. cit.*), at p.31: “Admittedly, this is a difficult, if not an insurmountable obstacle, since all of the individuals who were aware of the situation and who were capable of assisting could be held responsible”.

The principle of joint and several liability is not usually employed in such a way that the injured party executes the distribution of liability personally. To the contrary, the aim of the principle is to relieve the injured party from the burden of carrying out such a distribution. The spreading will instead occur at the next stage: In recourse.

3.3.5.2.3 Recourse

The injured party is not the only one concerned in increasing the number of persons held liable. The liable parties themselves also have an interest in as many people as possible attracting tortious liability.³²³ In this way the final share of damages attributable to each person would be less. A spreading of liability thus favours not only the injured party, but also the wrongdoer.³²⁴ Rules preventing recourse have existed under various legal orders, but have now either been abolished or are on the retreat.

Recourse claims may nevertheless not always be effected or carried out. A person who has been held jointly or severally liable in a case where the sufferer has claimed payment from him, may presumably attempt to shift the cost of the damages in another way, where recourse from one of the other liable parties is not possible for some reason. Apart from that, one can say that a shared liability might be more effective from a spreading point of view than joint and several liability, when a recourse action is blocked.

3.3.6 Freedom / Safety

Tortious rules and their application may also be viewed as an expression of where the border for freedom of action runs in society. This is this function of damages that has been highly valued by Richard Epstein, and quite rightly so. At the opposite end of the spectrum from this freedom we can place an individual's safety demands. The rules in tort mark the dividing line between freedom of action and safety. Viney claims in her discussion on discharge and limitation clauses affecting liability that the rules "nous semblent inspirées par le souci de faire respecter un certain équilibre entre la liberté d'agir et la sécurité des individus et des groupes".³²⁵ In *Schuldrecht* by J. Esser & H.-L. Weyers (1991) a differentiation is made between two areas of application for tort:

³²³ In *Osaka U.L. Rev.* vol. 35 (1988), at p. 1, André Tunc has told of how Rene Davids' spouse heard the driver of the other vehicle's first words following a collision: "Responsabilités partagées!". Here it was certainly a case of contributory negligence. But the experience may without difficulty be transferred to a downright case of multiple tortfeasors: each tortfeasor is aware that even others have a duty.

³²⁴ Cf. H. Giger, *Analyse deer Adäquanzproblematik im Haftpflichtrecht*. From: *Festschrift für Max Keller zum 65. Geburtstag*, Zürich 1989, from p. 141, at p. 141: "Wer auch immer von einem Schadenereignis betroffen wird – sein erster Gedanke dreht sich um die Möglichkeit einer Abwälzung der durch physische wie psychische. Beeinträchtigungen erlittenen materiellen, geldwerten Einbusse auf einen Dritten". The statement, as is apparent, covers both the interests of the injured party and the wrongdoer in the context.

³²⁵ G. Viney, *La responsabilité. Effets*, in note 193 above *op. cit.*, at p. 298.

“Unfallschaden” and “wo es je nach gesellschaftlichem Entwicklungszustand aktuell darum geht, *Handlungsspielraume und Freiheitsbereiche* zu definieren und gegeneinander abzugrenzen”.³²⁶ According to this work, prevention plays an undeniable role in the latter area.

One objection that can be raised against voluntary compensatory arrangements, that in a practical sense replace tort, is that they are incapable to a sufficient degree of giving the right signals of where the line of freedom of action is to be drawn.³²⁷

3.3.7 The Ombudsman

A tortious suit can give rise to disadvantageous publicity on the part of the alleged tortfeasor. Public opinion may be roused in favour of the sufferer. This may in turn give rise to an amicable settlement with the injured party.

Exactly how public opinion can blow new life into settlement talks³²⁸ is illustrated by the following case, one that has received a lot of attention the world over.³²⁹

Thalidomide was a medicament prescribed to pregnant women that turned out to injure to the foetus. In 1972, the Sunday Times published an article entitled “Our Thalidomide Children: A Cause for National Shame”. Sparing no words, it criticised harshly a proposed settlement put forward by Distillers Co. Ltd., the producers and marketers of thalidomide in the UK. The newspaper considered the proposed settlement to be completely inadequate. A Court was supposed to establish the settlement shortly afterwards. The Sunday Times vowed to return with a new piece aimed at reviewing the real cause of the harm. The Director of Public Prosecutions moved to ban publication of the article based on an action for contempt of court. The claim was upheld in the lower courts, but subsequently

³²⁶ Bd. II. *Besonderer Teil. Ein Lehrbuch begründet von J. Esser, fortgeführt von H.-L. Weyers*. 7th ed. Heidelberg 1991, at p. 522.

³²⁷ This appears to be an objection aimed towards compensation by the State for criminal damage in the US, put forward by R. Elias, *Victimology* vol. 8 (1983), in note 238 *op. cit.*, at p. 213.

³²⁸ On the other hand, it may be difficult in many other cases to determine for sure in hindsight to what degree public opinion has influenced the compensatory decision. One example is provided by the negotiations carried out concerning compensation to relatives of those who died in the fire on the Norwegian passenger ferry *Scandinavian Star* during the night of April 7, 1990. 158 people died in the accident under circumstances that upset public opinion. According to the Swedish media, a potential increase in compensation in cases such as this was to be discussed at the Nordic Justice Ministers’ meeting in August 1990. But the issue may have also been brought to the fore by the decision of the UN’s maritime body, the International Maritime Organization, a few weeks prior to this to raise its compensatory awards. See SvD, August 14, 1990, Part 1, at p. 7. A danger also lies in occasional emotional outbursts; overcompensation may, if it remains occasional, be compromising for tort law, *cf.* Frédérique, in note 19 above *op. cit.*, at p. 13.

³²⁹ See for the following, H. Teff & C. R. Munro, *Thalidomide: the legal aftermath*. Glamorgan, S. Wales 1979, at p. 65, and (for a shorter account), M. Cappelletti, *The Judicial Process in Comparative Perspective*. Ed. with the collaboration of P.J.Kollmer & J.M. Olson. Oxford 1989, at p. 83.

dismissed by the Court of Appeal. Upon further appeal to the House of Lords, the claim was upheld which prompted the newspaper to haul the case before the European Court of Human Rights. In an 8 to 5 majority ruling, the Court in Strasbourg found that the House of Lords had breached the European Convention on Human Rights, and the British Government consequently paid a sum in damages to the paper.

More important for the injured parties, however, was the fact that Distillers eventually accepted a settlement considerably better for the sufferers than that previously tabled. Public Opinion had been roused and this had an clear impact upon the outcome of the issue.

Another effect of opinion forming may be intervention by the state. The power weapon that tort wields rests in the hands of all citizens. Allen Linden sums up this point well:

“Thus anyone who feels injured by someone else may institute civil proceedings. He does not have to wait for some prosecutor or civil servant to take up his cause. Too often such public servants are reluctant to move. They may have only limited resources at their command. Politics may be involved. An aggrieved individual, however, labours under no such burden; he can unilaterally commence proceedings at any time, even if his case is by no means ironclad.”³³⁰

The same expert in tort has drawn attention to tort’s ability to control or overlook the actions of those that cause harm. He speaks of tort acting as a “watchdog” or “ombudsman”:³³¹ “A tort suit can challenge the decision-making power of the omnipotent and omnipresent managers of modern society. In a world dominated increasingly by distant, elite decision-makers, this watchdog role is becoming more and more necessary.”³³² Modern American legal literature discusses “social grievance redress” to this end.³³³

This function of tortious procedure appears especially with regard to the possibility of bringing claims of liability against the state and local communities. In Sweden it could be more compromising for a civil servant to be summoned in a tort suit than to be reprimanded in the official report of the Parliamentary Ombudsman. In this connection, American legal writings speak of the opportunity of placing “authority at the bench of the accused”.³³⁴ As seen above (3.3.3.6 *in fine*) the idea that tortious claims can shed light upon weaknesses in the workings of the public machinery has been recognised in Swedish legislative works concerning liability for harm caused following the exercise of public authority.

An objection that can obviously be raised against such contentions is that they are not always salable. Once an injured party obtains a judgment in his or her

330 A. M. Linden, *Tort Law as Ombudsman*, Can. B. Rev. vol. 51 (1973), from p. 155, at p. 158.

331 *Op. cit.*, at p. 155. See also F. C. Zacharias, *The Politics of Torts*, Yale L.J. vol. 95 (1986), from p. 698.

332 Linden, *op. cit.*, at p. 159.

333 So Reporters’ Study, in note 163 above *op. cit.*, at p. 26.

334 See G. Z. Hazard, Jr, *Authority in the Dock*, B. U. L. Rev. vol. 69 (1989), from p. 469.

favour against a company, it may already have left the stage. Others have to pay.³³⁵ This objection does not, however, generally hold water. According to the same contention, the whole tortious system could be abolished; there is always a risk inherent that the defendant will no longer be accessible for a tortious claim to be realised against him or her.

In Sweden the idea of tort law as an ombudsman conflicts with the legal-policy behind security insurance, patient insurance and medical insurance. These insurance systems were designed specifically in order to avoid hauling employers, doctors and pharmaceutical manufacturers before the courts. A reaction against the official Swedish position in this regard may nonetheless be forthcoming. Whilst preparing a case against a pharmaceutical company, a spokesperson for Swedish drug abusers stated:

“A public lawsuit forces quite another argumentation and submission of evidence than the “silent” treatment of the patient insurance does... Such an action would deliberate hundreds of thousands of people from shame and blame ... It is all a question of not only money but maybe above all redress and acknowledgment.”³³⁶

3.3.8 Justice, Sense of Justice and Morality

3.3.8.1 Justice

Calls for justice are heard from regularly in the tortious debate. They originate from tort law experts with varying aims and directions,³³⁷ but also from legal economists. Justice is one of the cornerstones of Calabresi’s theory.³³⁸

³³⁵ So Reporters’ Study, *op. cit.*, at p. 27.

³³⁶ A.-L. Haverdahl, *Tabletberoende förenar sig. Läkemedelsföretag stäms på mångmiljonbelopp i skadeståndsprocess*. SvD, September 23, 1991, Part 1, at p. 3.

³³⁷ Jan Hellner is amongst those who believe that justice must be observed but by no means is sufficient in itself in the awarding of damages. See Hellner, *Justice in the Distribution of Benefits*, Ratio Juris vol. 3 (1990), from p. 162 (“Arguments based on justice will lead us part of the way, but the final steps must be decided on other grounds”, at p. 171). From the international debate we can otherwise refer to among others L. N. Klar, *The Osborne report: “no” to no-fault*, Rev. Barr. Can. Vol. 68 (1989), after p. 301, and Toulemon & Moore, *Gaz. Pal. 1965.I.Doctr* (in note 197 above *op. cit.*), at p. 114.

³³⁸ On the one hand, justice for Calabresi – besides “accident cost reduction” (Calabresi, *op. cit.*, at p. 25) – is one of the primary goals of each “system of accident law” (*op. cit.*, at p. 24, note 1). On the other hand, he would rather treat it as “a constraint that can impose a veto on systems...” (*op. cit.*, at p. 25.) The reality is that what may be economically effective may be entirely unacceptable from the point of view of justice; justice thus becomes a necessary corrective instrument. *Cf. op. cit.*, at p. 25: “Our reaction to accidents is not a strict dollars-and-cents one”. It should also be emphasised that justice in Calabresi’s opinion hardly answers to what is known as social justice. His views have also been attacked from this point of view in American legal literature; see *e.g.* K. D. Sowle, *Toward a Synthesis of Product Liability Principles: Schwartz’s Model and the Cost-Minimization Alternative*, U. Miami L. Rev. vol. 46 (1991), from p. 1. (Here it is asserted that the trial costs in American product liability cases are so burdensome that they go straight against Calabresi’s goal of achieving cost minimisation. The article concludes with the following

More important still is the understanding that justice often provides the mainspring for reforms of the traditional rules. “A just system of law should not leave an injured consumer uncompensated because of blind adherence to traditional principles of law”.³³⁹

It can naturally be difficult to determine what is just and what is unjust in the field of tort. As a general observation, it is easier to point out injustices than examples of justice.³⁴⁰ The whole issue is complicated by the fact that what is deemed just in one area of harm may not necessarily be deemed so in another.³⁴¹ Much depends on how we choose to interpret the elementary justiciable point that same cases should be treated in the same way;³⁴² if we view the identical nature of cases merely in terms of harm having been caused, then tort would overflow with injustices. Many cases will not present any problems, however, in determining whether a rule or its very application proves just or not.

Both Swedish tortious doctrine and legislative work³⁴³ in the area of tort make occasional reference to justice. Yet one cannot claim that the argument is attributed a central role in tort.³⁴⁴ It is for example not counted as one of the functions of tort in the general legal textbooks and is almost entirely left out of Roos’ work “Ersättningsrätt och Ersättningssystem” published in the early 1990’s. In an international context, however, ample room has been made for justice in general accounts of tort.

A common subject of the justice argument is the right to personal injury compensation. Attention is drawn to several different types of injustice. One concerns the unsatisfactory system whereby the act of the injured party is subject to the whims of insurance companies to much too great an extent, often forcing the victim to compromise due to the circumstances of the case.³⁴⁵ Another form of injustice occurs when we look to the privileged status of victims as compared to those struck by illness that is unrelated to injury caused,³⁴⁶ an issue brought to

words: “The attempt to reconcile conflicting social values presents, perhaps, the most challenging problem of all. Any products liability system that does not make this attempt will not achieve consensus – and products liability reform will continue to be a futile exercise”, at p. 110).

339 R. A. Bays, *The market share theory: Sindell’s contribution to industry-wide liability*, Hous. L. Rev. vol. 19 (1981), from p. 107, at p. 108.

340 See Calabresi, *op. cit.*, at p. 24, with further reference to E. N. Cahn, *The Sense of Injustice*. Bloomington 1964.

341 See Calabresi, *op. cit.*, at pp. 25-26. A compensatory system based on tort thus does not need to be justiciable just because it leads to the same result within another such system.

342 This is a fundamental element in the demand for justice, see S. Strömholm, *Normer och mål – det normbundna beslutsfattandets särart*, SvJT 1976, from p. 161, at p. 175.

343 See e.g. the *Damages Act Government Bill*, where it was stated that one firstly should seek to “remove such disparities in the regulatory system that are not acceptable from the point of view of social justice and safety” (prop. 1972:5, at p. 100).

344 Cf. e.g. the cautious attitude in K. Grönfors, *Skadelidandes medverkan*. Stockholm 1954, pp. 22-23.

345 See e.g. H. Genn, *Hard bargaining. Out of Court Settlement in Personal Injury Actions*. Oxford 1987, *passim*.

346 See, for example, with direct experiences from real life in New Zealand: B. Rea, *Accident Compensation: A Cuckoo in the Sparrow’s Nest of Social Welfare*, Auckland U.L. Rev. vol. 4 (1980-1983), from p. 235.

the fore especially in connection with occupational injuries.³⁴⁷ A third form of injustice arises because certain groups of sufferers are treated in a less beneficial or advantageous way than others.³⁴⁸

3.3.8.2 Sense of Justice

Closely related to the ideas of justice portrayed directly above is that tortious rules should not offend our sense of justice. This pertains primarily to the *conditio* that the rules should not be hard for the layperson to swallow or stomach. People should accept them instinctively, otherwise they would prove difficult in their application.

The argument is also called upon in the most different of connections. It has been invoked for example as a defence for exemplary damages under English law. It has been said that the vitality of this form of intangible, punitive compensation may have come about because “the ordinary man feels that a defendant ought to be made to pay for insolent or outrageous conduct”.³⁴⁹ Room has also been made for exemplary damages even in New Zealand.³⁵⁰

What offends the sense of justice from one person’s point of view may well not seem offensive from another’s. This is illustrated by the following example taken from Swedish law. Employees are only liable in tort to their employers for harm caused during the course of employment in the rarest of cases. There must be special reasons for such a finding. The term “employee” or “worker” is extremely wide under Swedish law (see Chapter 6, Section 4 of the Damages Act). An individual who helps his neighbour in cutting down a tree may be considered as a worker or an employee for these purposes. He would not normally – in the absence of special reasons – be held liable in tort should he injure his neighbour during the course of the felling. His third party liability insurance could therefore not be relied upon either.³⁵¹ Roos has claimed that such an application would be completely in line with the wording of the legal text, but also constitutes a deathblow to Swedish helpfulness. He goes on to state

³⁴⁷ See *op. cit. passim*, but also even T. G. Ison, *The Dimensions of Industrial Disease*. Kingston 1978. The American legal theorist Roger C. Henderson has found the distinction in occupational injuries between occupational illnesses and other illnesses so burdensome that he proposed that all illnesses that hit employees should be compensated for within the framework of a wider and federally based compensatory scheme. See Henderson, *Should Workmens’ Compensation be Extended to Nonoccupational Injuries?* Tex. L. Rev. vol. 48 (1969), from p. 117.

³⁴⁸ See e.g. P. S. Atiyah, *Observation*. From: A. Tunc, *Pour une loi sur les accidents de la circulation*. Paris 1981, from p. 123, at pp. 123 and 124; E. Bloch, *La faute inexcusable du piéton* (Deux ans de jurisprudence et le coup d’arrêt de la Cour de cassation le 10 juillet 1987) J.C.P. 1988.I.3328, at note 1 with reference to Fr. Chabas, *Commentaire de la loi du 5 juillet 1985*, J.C.P. 1985.I.3205; P. Lødrup, in note 71 above *op. cit.*, at p. 241.

³⁴⁹ *Salmond and Heuston on the Law of Torts* by R. F. V. Heuston and R. A. Buckley. 20th ed. 1992, at p. 519, notes 32 and 33.

³⁵⁰ *Donselaar v. Donselaar* [1982] 2 N.Z.L.R. 97. See also *Salmond and Heuston, op. cit.*, at p. 519, note 33.

³⁵¹ On this issue, see M.-L., *Hem och Villaförsäkring*. Projektledare Carl Martin Roos. Stockholm 1988, at p. 125, and C. M. Roos, *Ett strövtåg i den privata ansvarsförsäkringens gränsland*, NFT 1989, from p. 108.

that many insurance policy holders have complained about this and that it disturbed their sense of justice.³⁵² It is one thing that the third party liability insurance will not come into play. But at the same time the “helpful” neighbour will also not attract personal liability in tort. Consequently, he will not have to make out any compensation whatsoever where he is not covered by insurance. The policyholder might well feel his sense of justice offended where his insurance company refuses to pay the neighbour any money. Yet is his sense of justice also offended when he discovers that, to the disadvantage of the neighbour, he attracts no liability in tort?

This naturally bids problems for providing an exact definition of what is meant by the “sense of justice”; this task lies primarily in the hands of the judge in a given case.³⁵³ To the common man, though, the argument would seem completely feasible.

3.3.8.3 Morality (Ethics)

Moral reactions to an injury belong to the realities of our existence. At the same time it is clear that they by no means have to correspond to the design of the regulatory system.³⁵⁴ The French legal theorist Carbonnier captures both of these truths in the following, beautiful words:

“Le mal s’étant produit, une voix interroge les hommes: qui la fait? qu’as-tu fait? Un homme doit répondre dans sa conscience, c’est la responsabilité morale; devant le droit, c’est la réponse juridique.”³⁵⁵

³⁵² *Op. cit.*, at p. 109.

³⁵³ Cf. J. Esser, *Richterrecht, Gerichtsgebrauch und Gewohnheitsrecht*. From: Festschrift für Fritz von Hippel zum 70. Geburtstag. Tübingen 1967, from p. 95, at p. 129: “Auch wo die höchstrichterliche Praxis einen gesicherten Stand und ihr Ergebnis durch dogmatische Verarbeitung die Autorität wissenschaftlich approbierter *opinio juris* erreicht hat, beruht ihre regelbildende Kraft nicht auf gewohnheitsrechtlichen Elementen, sondern auf der fortbestehenden sachlichen Richtigkeit und Überinstimmung mit der lebenden Rechtsüberzeugung”.

³⁵⁴ One central point in P. S. Atiyah’s work, *The Rise and Fall of Freedom of Contract*. Oxford 1979, is actually that the change to the contractual system from hard principles towards greater detail, and thereby also the possibility of sabotaging morality, by no means meant that people had become more immoral. The possibility of avoiding contractual agreements that the rules may impose does not therefore need to be accepted from a moral viewpoint. Atiyah wants in part to explain the shift in the rule pattern which largely came to pass in the 20th century, in that the old principles were too rigid; the shift is then likely to become more powerful than it otherwise would have been. See Atiyah, *op. cit.*, from p. 649. Cf. also *ibid. Promises, Morals, and Law*. Oxford 1981, at p. 5. One could explain the development of the rules of tort in the same manner. The old principles were too fixed. There has been a strong reaction, perhaps too strong in Sweden. In that case, one must also realistically count on the pendulum swinging back a touch towards the old design. On morality and law, see further S. Jørgensen, *Pluralis Juris. Towards a Relativistic Theory of Law*. Århus 1982, at p. 18 (“The parliament is and must be the authority to decide the “moral” contents of the law”).

³⁵⁵ The words were propounded by Carbonnier in *Concl.*, Civ. 2e, 21 juillet 1982, D. 1982 J. 449.

That morality does not necessarily have to do with the content of the tortious rules – a situation the Swedish rules on contributory negligence in personal injury cases can be said to support³⁵⁶ – may explain why moral viewpoints are not especially common in modern tort law debate.³⁵⁷ They do arise nevertheless, both generally³⁵⁸ as well as in more particular connections, for example in relation to causation reasoning.³⁵⁹

For the person working with tortious issues, morality may quite simply mean turning one's back on tort law altogether and creating special compensatory systems.³⁶⁰ Within the framework of tort law a number of different types of argument can be made based on morality. To these we find, amongst others, those based on: 1) Caution; 2) assumption of liability; and 3) legal economy. These will all be dealt with in turn directly below.

3.3.8.3.1 Duty of Care

According to one understanding, morality and a duty of care run in tandem. Lord Atkin emphasised in *Donoghue v. Stevenson*³⁶¹ that “liability for negligence, whether you style it such or treat it as in other systems as a species of ‘culpa’, it is no doubt based upon a general public sentiment of moral wrongdoing for

³⁵⁶ B. Bengtsson, *Några nyheter i skadeståndslagstiftningen*, SvJT 1976, from 593, at p. 613, where he speaks about “the general values that lie behind the legislation of 1975, after which he states that: ”It should no longer be any space worth mention for any moralising reasoning of where the essential blame for an accident should lies”.

³⁵⁷ A sometimes (e.g. K. S. Abraham, *What Is a Tort Claim? An Interpretation of Contemporary Tort Reform*, Md. L. Rev. vol. 51 (1992), from p. 172, at p. 173, note 1) relied upon contribution concerning tort law and morality is J. L. Coleman, *Moral Theories of Torts: Their Scope and Limits*, Law & Phil. vol. 1 (1982), from p. 371; it is included together with other works in *Justice, Rights and Tort Law*, ed. by M. D. Bayles and B. Chapman. Dordrecht, Boston 1983. On morality from the point of view of tort, cf. also G. L. Priest, *Modern tort law and its reform*, Val. U.L. Rev. vol. 22 (1987-1988), from p. 1, at p. 9; r. F. Blomquist, *Goals, means, and problems for modern tort law: a reply to professor Priest (Commentary)*, Val. U.L. Rev. vol. 22 (1987-1988), from p. 621, at p. 628. For the part of criminal law, see e.g. S. Jørgensen, *Johs. Andenæs og almenpræventionen*. From: Lov og frihet. Festskrift til Johs. Andenæs på 70-årsdagen, den 7. september 1982. Oslo 1982, from p. 177, at p. 181 note 24.

³⁵⁸ A study aimed at the decisions of courts in tortious disputes, and where arguments of morality often occur, is provided by H. J. Steiner, *Moral Argument and Social Vision in the Courts. A Study of Tort Accident Law*. Madison, Wisconsin 1987; see also hereto A. Tunc, *Book Review* (Steiner), Rev. intern. dr. comp. 1989, from p. 1077.

³⁵⁹ Another special situation in which moral values make themselves felt, is in the issue regarding damages awarded for unwanted children. The question has in more recent times been raised in French case law; see Civ. 1ère, 25 juin 1991, Rev. trim. dr. civ. 1991. 753, and note Jourdain; the moral issue has received great attention.

³⁶⁰ See E. Conradi, *Skadeståndsrätten och verkligheten*, SvJT 1969, from p. 316, at p. 331: “One can speak of brotherhood; one can also utilise the popular word solidarity. There are indications that appear to signal that a world solidarity is evolving that gives rise to hopes. (...) We should also in tort law start out from the point that it is solidarity that is the bearing feature, and not primarily the solidarity of the wrongdoer to the person incurring the injury, but all of our solidarity, our common duty to create as good protection and provide as much help as possible through various compensatory schemes.”

³⁶¹ [1932] A.C. 562.

which the offender must pay”.³⁶² Many contributions in American legal literature point in the same direction.³⁶³

3.3.8.3.2 Assuming Liability

Philosophical currents during the 1700’s and early 1800’s maintained a strict division between law and morality. The law represented a restraint exercised over individuals whilst morality represented the individual’s conscience. This implicit faith won support through Kant’s philosophy but was eventually displaced.³⁶⁴ In 1924, an English tort law expert, Carlton Kemp Allen, stated against the backdrop of a comparative study that: “The truth is that we are getting further and further away from the doctrine, once accepted almost as an axiom, that the spheres of law and morals are utterly distinct”.³⁶⁵ He emphasised the weight of morality’s anchoring in tortious rules.³⁶⁶ This sentiment is echoed in the modern, English tort law debate. The Pearson Commission thus found:

³⁶² A.C. 562, 580.

³⁶³ See, for example, J. B. Ames, *Law and Morals*, Harv. L. Rev. vol. 22 (1908), from p. 97, and J. Smith, *Sequel to Workmen’s Compensation Acts*, Harv. L. Rev. vol. 27 (1914), from p. 235, especially at p. 344. Perhaps even Holmes should be referred to here, even though he expressed himself with a more preventative line. (“The true explanation of the reference of liability to a moral standard, in the sense which has been explained, is not that it is for the purpose of improving men’s hearts, but that it is to give a man a fair chance to avoid doing the harm before he is held responsible for it”, at p. 144). Critical towards the linkage between liability and morality is L. A. Green, *The Thrust of Tort Law. Part I. The Influence of Environment*, W. Va. L. Rev. vol. 64 (1961), from p. 1, at p. 12; 31 years earlier in the work *Judge and Jury, Kansas City, Missouri 1930*, he had nevertheless claimed that: “Probably the moral or ethical factor, best indicated in legal theory by “liability based on fault”, is... (*op. cit.* at p. 97). For French doctrine here, see particularly J. Deliyannis, *La notion d’acte illicite. Considéré en sa qualité d’élément de la faute délictuelle*. Paris 1952, at p. 26: “Pour ce qui est du Droit francais on est, certainement presque d’accord, à l’heure actuelle, à admettre que la notion de faute implique un renvoi à la Morale,...”. Deliyannis believes that tort law rests on “l’idée de réprobation” (at p. 3), and discusses “les tendances idéalistes dans la responsabilité” ; his work is summarised in the words: “Car, on ne saurait dépouiller la notion de faute de toute idée de réprobation, qu’il s’agisse d’une réprobation morale ou d’une réprobation simplement “juridique” et sociale” (at p. 330). See also E.J. Weinrib, *Toward a Moral Theory of Negligence Law*, Law & Phil. vol. 22 (1983), from p. 37, and also R. Dworkin, *Law’s Empire*. Cambridge, Massachusetts 1986, at p. 268.

³⁶⁴ See C. K. Allen, *Legal Morality and the ius abutendi*, L. Q. Rev. vol. CLVIII (1924), from p. 164, at p. 180.

³⁶⁵ *Op. cit.* at p. 180.

³⁶⁶ Sir John Salmond, in his work *Essays in Jurisprudence and Legal History*. London 1981, pleaded in favour of the following principles: “Damage should lie where it falls unless there is some good reason for shifting it elsewhere”. Polemic to this (Allen, *op. cit.* at p. 179, note 1) and in commentary of Articles 1382 and 1383 c.c. and similar provisions in Switzerland and Italy, Allen asserted: “But this, it may be said, is not morality. It has nothing to do with conscience; it merely aims at compensation. But is it not morality? At all events, it is not a bad working code of righteousness for the average citizen. It comes as close as is reasonably possible to the *suum cuique tribuere*, and it carries with it by necessary implication the *honeste vivere*. For obviously, if you live righteously, you will run the least risk of injuring your neighbour, and of having to make reparation. But if you do cause damage, either deliberately or inadvertently, the reasonable reparation is the clearest dictate of justice in the moral as well as the legal sense” (*op. cit.* at pp. 178-179).

“There is elementary justice in the principle of the tort action that he who has by his fault injured his neighbour should make reparation. The concept of individual responsibility still has value”.³⁶⁷

Moral viewpoints of this kind can be found in the international³⁶⁸ but also Swedish³⁶⁹ tort discussion.

3.3.8.3.3 Reactions against the economic analysis of law

A third, more unique variety can be said to concern a reaction against excessive considerations of law and economics in tort. Moral appraisals are given prominence at their expense. A representative of this line of reasoning is the American legal theorist George P. Fletcher who believes the modern American tort law debate to be distorted. Instead of focussing on questions of “cost-spreading, risk distribution and cost avoidance”³⁷⁰, he prefers to cast the spotlight over the following:

“What is the relevance of risk-creating conduct to the just distribution of wealth? What is the rationale for an individual’s ‘right’ to recover for his losses? What are the criteria for justly singling out some people and making them, and not their neighbours, bear the costs of accidents? These persistent normative questions are the stuff of tort theory, but they are now too often ignored for the sake of inquiries about insurance and the efficient allocation of resources”.³⁷¹

In the USA a group of lawyers reacted against the partially imperialistic features of economics and other elements existent in legal reality. They defend a more conventional perspective of the legal rules with a whole line of arguments of a partially moral nature.³⁷² The same opposing perspectives may be found in the European debate.³⁷³ Karl-Heinz Fezer, writing back in 1988, sums up the critique:

After this, he focussed attention on the limitations to liability posed by tort; Allen does not seem to want any purely strict liability of the same kind desired by Epstein.

³⁶⁷ Pearson Report, in note 113 above *op. cit.*, at p. 65.

³⁶⁸ See *e.g.* D. Kretzmer, *Transformation of tort liability in the nineteenth century: the visible hand*, Oxford J. Legal Stud. vol. 4 (1984), from p. 46, at p. 47, note 3, and I. Englard, *The system builders: a critical appraisal of modern American tort theory*, J. Legal Studies vol. 9 (1980), from p. 27, at p. 50.

³⁶⁹ See *e.g.* Bengtsson, *Om ansvarsförsäkringens betydelse i skadeståndsmål*, SvJT 1961, from p. 627, at p. 628.

³⁷⁰ G. P. Fletcher, *Fairness and Utility in Tort Theory*, Harv. L. Rev. vol. 85 (1971-1972), from p. 537, at p. 537.

³⁷¹ *Op. cit.* at p. 538.

³⁷² One of these is that the law is itself, and cannot be changed into something that it is not. The argument is summarised and analysed by R. A. Posner in *Conventionalism: The key to law as an autonomous discipline?* U. Toronto L. J. vol. XXXVIII (1988), from p. 333, at p. 337.

³⁷³ See *e.g.* K.-H. Fezer, *Aspekte einer Rechtskritik an der economic analysis of law and am property rights approach*, JZ 1986, from p. 817 (see especially at p. 821), and *ibid.*, *Nochmals: Kritik an der ökonomischen Analyse des Rechts*, JZ 1988, from p. 223.

“Der Kern aller Kritik an der economic analysis of law führt zuruück auf das *Menschenbild* des homo oeconomicus in Gestalt des resourceful, evaluative, maximising man (REMM), der die realitätsferne Welt der Theoretiker der ökonomischen Effizienz belebt. Prämisse der ökonomischen Rechtstheorie ist der Mensch als schierer Nutzenmaximieter.³⁷⁴ (...)

An die Stelle einer wohlfartssteigernden Effizienz des Ökonomischen ist die Selbstkonstitution des Menschen als Person – Selbstverwirklichung als Selbstbestimmung des Rechts zu erheben. Es ist die Effizienz des Sittlichen im Recht einzulösen. Die bestmögliche Verbürgung der Freiheit des Menschen im Recht vermag nicht minder ein Optimum an sozialer Gerechtigkeit zu versprechen”.³⁷⁵

The whole trend moving towards economic thought that lie behind tort can be called into question. It conceals other possibilities of improving the sense of togetherness.

One claim made at an early stage in the American debate resounds: “Is there any meaning ‘left over’ for justice once efficiency goals have been attended to?”.³⁷⁶ The criticism against the procedure that involves transforming fault judgments to questions of economic efficiency is headed in the same direction: “People are abstracted from their suffering; they are dehumanized”.³⁷⁷ In 1973, the Canadian authority on tortious issues Allen Linden sighed – in a speech commonly known as his “cri de coeur”³⁷⁸: “Is there any real deterrent role that remains? Is there anything in this concept of general or market deterrence? As I get older, I am becoming more interested in religion and morals which leads me to the symbolic function of tort law. I do not think we have studied this enough”.³⁷⁹

One can simply not accept horrendous, incisive expressions of economics such as: “I am free to destroy your property as long as I can pay for it”.³⁸⁰

Simply transferring economic models to tort may prove a difficult trick to pull off.³⁸¹ The values that are preserved and utilised in tort may be way too fragile to withstand the harsh economic reality. The reaction has been forthcoming nonetheless. The world in which legal economists work has been

³⁷⁴ Fezer, *op. cit.*, at p. 227.

³⁷⁵ *Op. cit.*, at p. 228.

³⁷⁶ Blum & Kalven, in note 279 above *op. cit.*, at p. 265.

³⁷⁷ L. A. Bender, *A Lawyer’s Primer on Feminist Theory and Tort*, J. Legal Educ. Vol. 38 (1988), from p. 3, at p. 31.

³⁷⁸ So England, *op. cit.*, at p. 50, note 99.

³⁷⁹ From V. E. Schwartz, *Torts Casebooks on Parade: The Authors Meet the Users*, J. Legal Educ. vol. 25 (1973), from p. 4, at p. 35; the statement is reproduced in England, *op. cit.*

³⁸⁰ Laycock, in note 158 above *op. cit.*, at p. 3.

³⁸¹ It is worth noting that wrongdoers and injured parties often have a tendency to meet in the law and economics debate. The different types of conduct at issue here – the wrongdoers’ and the injured parties’ – cannot, however, be put on an equal footing just like that. See A. K. Leong, *Liability rules when injurers as well as victims suffer losses*, Int’l. Rev. L. & Econ. vol. 9 (1989), from p. 105, where the difficulties that arise when even a wrongdoer is injured are treated.

called an “empty” world, divorced from reality at the expense of morality.³⁸² One American legal theorist summarised the point in the following words:

“Economics is a shadowy world at best, hardly able to withstand scrutiny in clear light. No self-respecting economist would assert that mere economic efficiency is a moral desideratum. Tort law, however, is centrally grounded on moral concepts”.³⁸³

In Scandinavia, Stig Jørgensen has emphasised how legal and societal procedures that perceive legal rules as subsidiaries in relation to culture of society overlook the normative side of law and morality. He provides the following example: There are two strips of grass. A sign has been erected on each. One of them forbids entry and prescribes a 10 DK penalty for trespassing. The other sign stipulates that entry will be permitted in return for a 10 DK toll. “An *economist* will see no difference in the outcome where people cross the different lawns; but for a *lawyer*, there is a clear difference, and that this difference is of a normative nature. The *object* of the two signs is different. The first one, basing itself on a prioritisation of incommensurable values, aims at avoiding trespassing. The second one, based on considerations of efficacy, aims at achieving a maximum in terms of material values.”³⁸⁴

3.3.8.4 Corrective Justice

A theory of corrective justice has been developed, essentially by the American legal theorist Richard Epstein. Supporters of this theory – so called “autonomy theorists”³⁸⁵ – contend that the task of tort law is to protect the freedom of individuals. The theory is based on the idea that all individuals have the right of autonomy. Interventions with such freedom should only occur where a person has suffered some kind of injury. For moral reasons, the tortfeasor should place the injured party back in the same position as if the injury had never occurred, “rendering to each person whatever redress is required because of the violation of his rights by another”.³⁸⁶ This happens by way of “corrective justice”. Epstein believes that this can only be realised by the introduction of strict liability, and furthermore that only special exceptions be made to free individuals from such liability. Not all sympathisers share his view on this point.³⁸⁷

One could of course object to the theory of corrective justice that the kind of justice sought will not always be realised. The wrongdoer will not always be under a duty to restore the state of affairs to what existed before the injury

³⁸² See especially the elegant and sharp criticism on the point in Blum & Kalven, *op. cit.*, at p. 239.

³⁸³ Phillips, in note 183 above *op. cit.* at p. 604, note. 92.

³⁸⁴ S. Jørgensen, *Rettens grenser*, Juristen 1988, from p. 350, at p. 354.

³⁸⁵ *Op. cit.* at p. 479.

³⁸⁶ R. A. Epstein, *Nuisance Law: Corrective Justice and its utilitarian Constraints*, J. Legal Studies vol. 8 (1979), from p. 49, at p. 50.

³⁸⁷ See e.g. Weinrib, in note 364 *op. cit.*, p. 37; the author of the present account would like it instead to be based on fault liability. See further M. J. Trebilcock, *The future of tort law: Mapping the contours of the debate*, Can. Bus. L.J. vol. 15 (1989), from p. 471, at p. 479.

occurred, because the burden of damages will usually be borne by third party liability insurance or an employer instead.³⁸⁸ The issue revolves around exactly how literally we choose to interpret corrective justice. The justice sought may well be done even though the wrongdoer does not have to pay the damages personally.

The theory of corrective justice is regarded as having particular significance in the field of harm caused to the environment. It is sometimes understood as an appropriate and opposing alternative to excessive economic thinking in tort.³⁸⁹ Corrective justice has received great attention in Anglo-American doctrine. Set next to compensation and prevention, corrective justice is today hailed as the third rock in the crown that represents the functions of tort.³⁹⁰

3.3.8.5 Mixed Views

In international literature on tort we also find points of that, although essentially moralistic, also contain a mixture of the above mentioned theories. One such example is illustrated in the following extract, as seen from a feministic point of view:

“Why, for instance, do tort damages recognize financial loss and yet remain reluctant to recognize loss, such as loss of the companionship of a child, or intangible harms, such as an increased risk of cancer or loss of a less-than-even chance of survival? Why are tort remedies all translated into money values instead of other forms of compensation? Why do we settle for the ease of monetary payment (particularly insurance premiums) instead of requiring tortfeasors to take fuller and more personally active responsibility for the harms they cause? How does tort analysis serve to perpetuate existing power hierarchies? Feminist critiques challenge the implicit assumptions in the very structure of the analysis we use”.³⁹¹

³⁸⁸ So Reporters’ Study, in note 163 above *op. cit.*, at p. 25.

³⁸⁹ See, for example, A. W. McThenia & J. E. Ulrich, *A return to principles of corrective justice in deciding economic loss cases*, Va. L. Rev. vol. 69 (1983), from p. 1517 (“This economic model regards tort law as an instrument of social control that deters inefficient conduct and maximizes social wealth rather than as a means of effectuating justice between individual litigants- the corrective justice view”, at p. 1517).

³⁹⁰ According to C. H. Schroeder, *Corrective Justice and Liability for Increasing Risks*, UCLA L. Rev. vol. 37 (1990), from p. 439, at p. 439, corrective justice is, besides law and economics, “one of the two most powerful theories in American legal thought today.” On corrective justice, see further: S. D. Smith, *The critics and the “crisis”: a reassessment of current conceptions of tort law*, Cornell L. Rev. vol. 72 (1987), from p. 765; Trebilcock, *op. cit.*, p. 479; E. J. Weinrib, *Understanding tort law*, Val. U.L. Rev. vol. 23 (1988-1989), from p 485.

³⁹¹ L. Bender, *A Lawyer’s Primer on Feminist Theory and Tort*, J. Legal Educ. vol. 38 (1988), from p. 3, at p. 37. Other feminist analyses or not lacking in the international debate in tort; see e.g. N. West, *Rape in the Criminal Law and the Victim’s Tort Alternataive. A Feminist Analysis*. Note, U. Toronto Fac. L. Rev. vol. 50 (1992), from p. 96 (the possibility of a rape victim to bring a tortious suit against the wrongdoer rather than ineffective punishments is supported).

3.3.8.6 Multiple Tortfeasors

3.3.8.6.1 The Conditions of Liability

A choice dictated by X's understanding of which wrongdoer is closest related to the damage physically may yield the correct result. Even so, this would have to be seen as a primitive solution, and the dividing line employed unreliable. A complete assessment of the legal situation is required, and this in turn may prove that the person closest related to the damage physically is not the right target for the claim of damages at all. Assume that X has been bitten by a dog owned by B. Assume further that A intentionally provoked the dog to bite X and that both A and B have liability insurance. A will have to answer according to the fault rule. Where damages are claimed from A, the injured party will have to prove intent or negligence. B's culpable liability on the other hand will not have to be proved; B's liability is strict. Already this fact supports the conclusion that it will be more convenient for X to direct the claim for damages against B. But additionally, A's liability would normally be not be covered by A's liability insurance where A has acted with intent.

One example where the legal situation will not be as clear, however, is in the following case. X has a right of passage because he has an easement on B's land. He cannot enjoy his right, however, as A – who has been assigned by B to clear the woods – has culpably damaged the road in question. It may seem natural for the injured party in this case to direct a claim for compensation towards A – the wrongdoer. Such a claim is covered from a legal point of view. Even though we are dealing with an issue of damage caused by a third party, an award of damages cannot be ruled out; *de lege ferenda*, this is actually suitable. It is not, however, a certainty. It may be less stressful for X to claim damages from B relying on the contractual relationship between them.

Notions or ideas of justice may lie behind X's choice of A as the subject of liability in both of these cases. However natural considerations of this kind may be, they can obviously take the entirely wrong path according to modern tort law. The right cost bearer, the person who can most easily arrange protective insurance, the person who can best foresee the risk of injury, may well be an entirely different person.³⁹² This is evident not least from the shaping of employers' and employees' tortious liability under Swedish law. The subject of liability will normally be the employer, not the employee, even where the latter is closest related to the damage caused.

Justice is called upon sometimes when a comparison is made with the rules applicable in cases involving only one wrongdoer. Why, one asks, should the injured party be treated worse simply because there are more tortfeasors and not solely one?

³⁹² From the discussion on general deterrence, see Calabresi, *op. cit.* p. 135.

3.3.8.6.2 Joint and Several Liability or Shared Liability?

The rule of joint and several liability is sometimes justified with extremely general arguments.³⁹³ Especially strongly linked in this connection, however, are viewpoints of a justifiable nature. The vulnerable position of the injured party is often placed against the backdrop of the convenience offered by joint or several liability in obtaining a full award of damages arising out of the liability of numerous persons; joint and several liability may well in this connection be comparable to national or liability insurance.³⁹⁴

Not all enjoy the same understanding of the justice inherent in joint and several liability, however. In America we can to the contrary find the point of view expressing the severe injustice inherent in this type of liability, and that it should therefore be abandoned to the benefit of a shared liability. The person who only to the least extent contributed to causing the damage may in American society ultimately bear the entire burden of the damages due to difficulties in retrieving any compensation from the other wrongdoers and this is considered entirely unacceptable. This illustrates the empty reasoning behind the contention that joint and several liability is justified by virtue of subsequent recourse actions. Recourse might be difficult to perform. Seen from this side, it may appear more just to many with an arrangement that instead involves splitting liability directly between the wrongdoers. But even apart from the point of view that recourse may not be possible, a shared liability may seem more just than joint or several liability. This goes especially where a rigid tortious liability is at issue – one example of this is the shared liability which aided the French legislature attempts to mitigate the harsh tortious liability prescribed in *la loi "anti-casseurs"*.

³⁹³ See e.g. C. Demolombe, *Traité des engagements qui se forment sans convention. Des contrats ou des obligations conventionnelles en général*. Tome huitième. Paris 1982, who claims that the liability “a lieu indépendamment de toute disposition de la par la force même des choses, par la nécessité des situations lorsqu’en effet il sort de ces situations une obligation telle, par sa propre constitution, que plusieurs s’en trouvent tenus chacun pour le tout” (no. 295). See also G. Marty & P. Raynaud, *Droit civil*. Tome II. 1^{er} volume. Les obligations. Paris 1962 no. 797: “l’obligation au total tient a la nature même du rapport juridique”. Reasoning such as this has almost a natural law ring to it. General legal principles are sometimes also relied upon; see R. Savatier, *La théorie des obligations en droit privé économique*, 4e éd. Paris 1979 no. 488, at p. 45, and J. Vincent, *L’extension en jurisprudence de la notion de solidarité passive*, Rev. trim. dr. civ. 1939, from p. 601, at p. 668.

³⁹⁴ See e.g. B. C. Betebner, *The Liability Reform Act: An Approach To Equitable Application*, J. Contemp. L. vol. 13 (1987), at p. 95: “The method of risk distribution represented by the rules of joint and several liability can be considered a form of social insurance. It is perceived as being the more equitable methods of assigning ultimate responsibility because an injured tort victim is generally less able to absorb a substantial loss, whereas the tort-feasor, via liability insurance, is considered a conduit for distributing the loss over the community.”

3.3.8.6.3 Recourse

Generally speaking we can say that recourse above all can be easily linked with viewpoints of justice, sense of justice and morality. It is considered unsatisfactory from these viewpoints that a tortfeasor who has been asked to pay the entire award of damages, despite the fact that the other wrongdoers perhaps have a substantial share in the damage, also should bear the ultimate burden of damages alone. Legal theorists that have not accepted recourse out of hand as it appears incompatible with their basic understanding that each tortfeasor has caused all of the damage, often end up in arguments that to a great extent go in the same direction as these viewpoints.

To the extent that recourse distribution is based on a test of reasonableness, points of view of the kind mentioned directly above naturally have great possibilities to make themselves applicable in quite general terms. They have also accomplished this, so for example concerning morality and American law. Special situations exist where they have been called upon. One can by way of example say that it is objectionable to allow the individual who intentionally has caused damage next to the individual under a strict liability to avoid his liability entirely in the recourse round.³⁹⁵

3.3.9 Punishment

3.3.9.1 General

The legal political goal,³⁹⁶ the argumentation³⁹⁷ and the legal technique, all of these are factors that may have a completely different content in criminal law than in tort. The tortious rules have also relinquished themselves successively from the criminal ones. This process has presumably been facilitated by the fact that tort has been placed closer in relation to compensatory systems, such as social insurance, within which punitive ideas have found it increasingly difficult to assert themselves.³⁹⁸

³⁹⁵ Cf., concerning a similar contribution case, prop. 1992/1993:38, at p. 14: "Precisely because the only offence that has been committed rests with the injured party, the solution provided by the Damages Act may seem objectionable to many; the harm appears to such an essential degree as self inflicted, that the injured party should not reasonably be able to claim a full amount of damages as soon as a defect in the product contributes to the harm."

³⁹⁶ Cf. J. Esser & H.-L. Weyers, *Schuldrecht*. Bd. II. Besonderer Teil. Ein Lehrbuch begründet von J. Esser, forrggeführt von H.-L. Weyers. 7 ed. Heidelberg 1991, at p. 528.

³⁹⁷ One example is that whilst analogous endings are forbidden in criminal law, in principle they are considered acceptable in tort law; see S. Jørgensen, JFT 1979, at p. 326.

³⁹⁸ See for America, F. James, *Social Insurance and Tort Liability: The Problem of Alternative Remedies*, N.Y.U.L. Rev. vol. 27 (1952), from p. 537, at p. 546: "What is left under this head, then, springs from a feeling of indignation or resentment and a desire to punish as such. Surely there is no place for such a notion in any philosophy on social insurance. It has no acknowledges place even in tort liability based on fault, for the theory of damages here is purely compensatory. And there is nothing in the context of modern accident law that would warrant bringing such a notion into the civil law at this late date", at p. 546.

Legal theorists can for tort law's part connect with the criminal rules in various contexts. In principle, however, they are usually then conscious that two different areas of law are at issue, and that these have to be subjected to different treatment.³⁹⁹ Criminal law may either form the point of departure or cast light on a particular question; that is all.

The influence of criminal law on tortious rules has not, however, entirely rendered itself obsolete. As a matter of fact, it seems as though it remains in large parts of the world.⁴⁰⁰ The influence of punitive ideas is perhaps clearest in relation to compensation for non-pecuniary damages. Pierre Tercier stressed in a report in 1980 addressed to the Comité Européen des assurances that, when it came to the conditions in Europe in general terms, compensation for intangible harms undoubtedly contained punitive features:

“Il est indéniable d’abord que la réparation des préjudices extra-patrimoniaux peut conserver un caractère pénal plus marqué que la réparation des préjudices patrimoniaux. La victime entend souvent surtout satisfaire son besoin de vengeance, en exigeant de l’amateur un sacrifice supplémentaire. Les tribunaux peuvent également vouloir assurer par ce biais une protection accrue de la personnalité, en frappant d’une “peine” toute personne qui y porte illicitement atteinte”.⁴⁰¹

German tort law operates with a “Genugtuungsfunktion” not merely when it comes to compensation for intangible harms but also with other types of compensation.⁴⁰² In America we find so-called “punitive damages”; this form of damages also exists in England, although to a considerably more limited extent. A more modest variation of this is to be found in Norwegian law (“oppreisning”).

For Sweden's part, it is more difficult to discover penal influences in compensation for intangible harms. The closest to this one seems to get to this is in relation to certain contractual relations. It has thus been claimed that general damages in labour law in reality bear a penal character.⁴⁰³ Opinion is split on this

³⁹⁹ See e.g. G. L. Williams, *Effect of penal legislation in the law of tort*, *Modern L. Rev.* vol. 23 (1960), from p. 233 (“From this causal indication we are left to gather that the Act is intended to operate in the field of tort as well as the field of crime, and so the courts have held. (...) It is submitted that, in the absence of some such words in a statute, provisions which are primarily penal in character should not be held to extend the range of civil duties”, at p. 259).

⁴⁰⁰ See on this topic H. Stoll, *Penal Purposes in the Law of Tort*, *Am. J. Comp. L.* vol. 18 (1970), from p. 3; A. Ashworth, *Punishment and Compensation: victims, offenders and the state*, *Oxford J. Legal Stud.* vol. 6 (1986), from p. 86.

⁴⁰¹ P. Tercier, *Les préjudices extra-patrimoniaux. Principes et normes de la réparation*. Rapport initial. 9e colloque juridique international du Comité européen des assurances, R.G.A.T. 1980, from p. 575, at p. 600.

⁴⁰² So Esser & Weyers, *op. cit.*, p. 528.

⁴⁰³ So P. O. Ekelöf, *Straffet, skadeståndet och vitet. En studie över de rättsliga sanktionernas verkningssätt*. Uppsala, Leipzig 1941, at p. 124. See also for further references; T. Sigeman, *Bot, plikt och skadestånd. Om påföljder för kollektivavtalsbrott i nordisk rätt*. From: *Perspektiv på arbetsrätten. Vänbok till Axel Adlercreutz*. Lund 1983, from p. 301, at pp. 320-321.

point, however. The fact that there are those who contend general damages have a different import than punishment should perhaps be seen as typical for the general reluctance in Sweden to accept punitive ideas into the school of damages.⁴⁰⁴

Criminal law has, however, been able to manifest itself in other regards in Swedish tort law than in relation to non-pecuniary damages. This concerns above all one principle considered to exist in Swedish law implying that crime in itself meditates tortious liability. This maxim gains particular importance when it comes to pure economic loss and appears clearly by virtue of Chapter 2, Section 4 of the Damages Act.⁴⁰⁵ Viewpoints based on criminal law may nevertheless more or less sneak up on tortious issues. One example of this may be the following. A suit for damages based on a criminal offence which is publicly prosecuted may, on the request of the plaintiff, be brought by the public prosecutor according to Chapter 22, Section 2 Rättegångsbalken. This possibility was extended further by an Act (1988:6) amending Rättegångsbalken, by virtue of which the prosecutor, where legal action was instituted in relation to a crime, was now placed under a greater duty to bring tortious suits for damage caused in relation to that crime.⁴⁰⁶ The statute places limits on this duty. Where a prosecutor for some reason – for example due to the complicated nature of a case – does not manage to examine the issue of damages, then he or she will be freed from the duty to assist the injured party in the way described directly above.⁴⁰⁷ There should not therefore be any risk that the prosecutor's way of setting forth the question of damages will be unnecessarily coloured by ideals of criminal law. Nevertheless, this does not rule out the risk that cases brought by prosecutors will never be influenced by underlying considerations of criminal law; where this concerns the basis of the legal action, a change in this respect would in principle be unattainable for the judge.

3.3.9.2 Multiple Tortfeasors

There are many criminal law features in the rules covering multiple tortfeasors. The development has mainly been the same in this regard as with tort law in general – the features have diminished gradually. Regarding general tort legislation, there remains in Swedish law but one provision containing a direct link to rules of criminal law: Chapter 2, Section 5 of the Damages Act, a provision that according to this author should be abolished entirely.

⁴⁰⁴ See for further references Nilsson, in note 271 above *op. cit.*, at p. 138.

⁴⁰⁵ See Kleineman, in note 41 above *op. cit.*, at p. 131, and B. W. Dufwa, *Skyddat intresse, ren förmögenhetsskada och andra skadeståndsrättsliga spörsmål I ett internationellt perspektiv*. From: Festskrift till Sveriges Advokatsamfund 1887-1987. Stockholm 1987, from p. 173, at p. 204.

⁴⁰⁶ See NJA II, 1988, at p. 11.

⁴⁰⁷ According to Chapter 2, Section 2(1) of Rättegångsbalken, liability will only be imposed on the prosecutor “if it can happen without significant inconvenience and his case is not openly unfounded”. See also Chapter 22, Section 5 of Rättegångsbalken. See further NJA II 1988, at p. 14.

3.4 Transaction Costs

3.4.1 General

That tort law involves higher transaction costs than other compensatory systems has been a well-known fact for the longest of times. In cases involving a single tortfeasor, the task is first to determine whether the conditions for liability have been satisfied. Once the conditions have been met, one has to determine next what size the award of damages should be. "In sum, the system is geared to individual processing and does not favour economies of scale".⁴⁰⁸

In the legal-economic literature the more comprehensive term "transaction costs" is used in this regard. Roos, who uses this term to cover both contractual as well as non-contractual relations, differentiates between various types of transaction costs: information costs, distribution costs, claims adjustment costs, control costs and dispute costs.⁴⁰⁹ The latter of these relate to the costs that the injured party will incur in eventual litigation.⁴¹⁰

As we have seen above (2.1.1.), the Minister in 1972 noted the expensive nature in the administration of the tortious system. The legislature has also instituted several measures to lower the transaction costs in this field. One example of this is provided by the rules concerning a bringing together of parallel aims introduced by Rättegångsbalken in 1987.⁴¹¹

3.4.2 Multiple Tortfeasors

In cases involving multiple tortfeasors, transaction costs would probably be higher on average than in cases involving only one tortfeasor.⁴¹² It will normally be a question of assessments being conducted in several rounds. The conditions of liability will have to be tested first, and then distribution through recourse actions. The former can be brought to the fore in several connections, dependent upon whose liability is at issue. The number of representational fees increases, and the investigation becomes all the more expensive.

⁴⁰⁸ J. G. Fleming, *The American Tort Process*. Oxford 1988, at p. 19.

⁴⁰⁹ See C. M. Roos, *Ersättningsrätt och ersättningssystem. En lärobok och idébok om ersättning vid personskada och sagskada*. Stockholm 1990, at p. 49, and *ibid.*, *Personskadeersättning i arbetslivets försäkringar – idéer och uppslag*, SvJT 1991, from p. 143.

⁴¹⁰ Roos, *Ersättningsrätt och ersättningssystem, op. cit.*, at p. 53.

⁴¹¹ A new provision was added to Rättegångsbalken, Chapter 14, Section 7a, by virtue of the Act Amending Rättegångsbalken (1987:747). This Act came into force on January 1 1988. See SOU 1982:26, at p. 190, and 1987, at p. 184 (the Minister).

⁴¹² Cf. W. L. F. Felstiner, T. Durkin & P. Siegelman, *Consumers as Workers: The Problems of Complacent Theory*, *Journal of Consumer Policy* vol. 12 (1989), from p. 381, at pp. 385-386: "Variation in costs arises from factors such as the number of defendants involved in typical cases (the more defendants, the more complicated the discovery and negotiations), the level of disputing between defendants, between defendants and their insurers and between insurers, options such as bankruptcy reorganizations, and the extent to which defendants and their insurers can coordinate their defense efforts".

The experiences provided by the Agent Orange dispute in America are rather particular. They are nevertheless illustrative of the problems that usually arise and increase the transaction costs in cases involving multiple tortfeasors:

“In calculating defense costs, one must bear in mind that the presence of seven defendants with seven separate law firms does more than multiply the defense costs by seven. Inherent in any multiple defendant case is the tendency of one or more defendants to point the finger at other defendants, suggesting that it is another defendant who shall bear all or at least a larger part of any verdict. This greatly complicates the case for each defendant, while materially assisting defendants.

The potential for such conflict was present in the Agent Orange litigation. Each defendant, for example, sold different quantities of the herbicide to the government. Thus the court found that “[t]he amount of dioxin in the Agent Orange varied from defendant to defendant.” Moreover, it is likely that each defendant’s knowledge of toxicity was different and that each warning label was different. Defendants in these circumstances are often unable to present and maintain a united front to the plaintiffs, compounding legal costs and delighting plaintiffs’ counsel, who will be content to allow the defendants to establish much of the plaintiffs’ case.”⁴¹³

Fear of the transaction costs in cases involving multiple defendants may be a reality within Swedish legislative work. An example of this can be retrieved from the realm of product liability. As we have seen above (3.3.5.2.1.ba) a seller is by virtue of Section 31 of Consumer Purchases Act placed under a duty to inspect for certain types of damage. The Consumer Purchases Investigative Committee (“Konsumentköpsutredningen”), upon whose report the law was based and whom also recommended the introduction of a strict liability, contended that once a retailer had made out a payment of damages, he should be allowed to bring these to bear on the market chain.⁴¹⁴ The Committee was highly aware of the fact that this could bring about costs. It went on to state:

“One disadvantage with a system of this kind is that it gives rise to recourse claims that bring about administrative costs. We nevertheless consider that these drawbacks are weighed out in part by the advantages that a seller liability for product damage provides consumers and also in part the beneficial effect on the product safety testing that a manufacturer’s liability should bring about. We would, however, like to emphasise the desire for flexible routines for damage regulation to be worked out. Thus is it is for example desirable that in such cases a direct contact be established between the retailer and the party ultimately found liable so that recourse through several stages is avoided”.⁴¹⁵

The relief that the Committee could point to as yielded by such an inverse search in the market chain, was that exoneration clauses denying the possibility for recourse, should in principle be regarded as unreasonable. Such clauses should therefore be set aside with the support of Section 36 of the General Contract Act

⁴¹³ R. H. Sand, *How much is enough? Observations in light of the agent orange settlement*, Harv. Envril. L. Rev. vol. 9 (1985), from p. 283, p. 298.

⁴¹⁴ See SOU 1984:25, at p. 195; SOU 1979:79, at p. 117; and Ds 1989:79, at p. 110.

⁴¹⁵ SOU 1984:25, at p. 196.

(“Lag om avtal och andra rättshandlingar på förmögenhetsrättens område (1915:218)”⁴¹⁶ The legislature provided more resolute help, however. The inspection duty imposed on vendors by virtue of Section 31 of the Consumer Purchaser Act (konsumentköplagen) may, just as the inspection duty imposed by Section 31 (4) Consumer Service Act (konsumenttjänstlagen), according to Product Liability Act (produktansvarslagen) may be brought back directly to the manufacturer through recourse. A special rule on this point has been set out in the Act (Section 10). In the produktansvarslagen bill the issue of transaction costs was raised more generally.⁴¹⁷ The following, lofty manifesto was presented:

“When legislating on strict liability in tort, it is normal that the circle of tortfeasors is limited to a few subjects. Economic arguments often speak in favour of such a solution. The same risk does not then have to be insured from several quarters. Expensive recourse procedures can be avoided. Such viewpoints can be quoted even in relation to product liability. Not least for the consumers – as buyers of the product – it is important that the costs for product damage and for their treatment are maintained at a low level. On the other hand it is in the interests of the victims that tortious liability is not channelled to so few people that a claim against one of them is made difficult.”⁴¹⁸

The struggle to reduce the costs associated with recourse is evidenced even in other countries; in international tortious doctrine and application of laws we can spy a clear dissatisfaction with cost inducing recourse actions. Less common is the idea more on principle of limiting the number of persons deemed liable in tort.

⁴¹⁶ SOU 1984:25, at p. 196.

⁴¹⁷ Even other reasons were nevertheless allowed to drive the new system. Essentially, it was in part the situation that Section 36 of the Contract Law Act that was insufficient in prohibiting exoneration clauses, in part preventative reasons. See prop. 1990/91:197, at p. 60.

⁴¹⁸ Prop. 1990/91:197, at p. 43.

Abbreviations

A.B.A. J.	American Bar Association Journal (Chicago)
A.C.	Appeal Cases (London; a part of Law Reports Third Series)
AcP	Archiv für die civilistische Praxis (Tübingen)
Am. J. Comp. L.	The American Journal of Comparative Law (Berkeley, Ca)
Ariz. L. Rev.	Arizona Law Review (Tuscon, Arizona)
Auckland U.L. Rev.	Auckland University Law Review (Auckland, New Zealand)
Austr. L. J.	Tha Australian Law Journal (North Ryde)
Bd.	Band
BGHZ	Entscheidungen des Bundesgerichtshofs in Zivilsachen (Amtliche Sammlung)
Buffalo L. Rev.	Buffalo Law Review (Buffalo, New York)
B.U.L. Rev.	Boston University Law Review (Boston)
Calif. L. Rev.	California Law Review (Berkeley, California)
Can. B. Rev.	Canadian Bar Review [La revue du barreau canadien] (Ottawa)
Can. Bus. L.J.	Canadian Business Law Journal (Aurora, Canada)
Conn. L. Rev.	Connecticut Law Review (West Hartford, Connecticut)
Current Legal Probs.	Current Legal Problems (London)
dir.	direktiv
Doctr.	Doctrine
Ds	Departementsserie
Emory L.J.	Emory Law Journal (Atlantica, Georgia)
Envtl. L.	Environmental Law (Portland, Oregon)
Ga. L. Rev.	Georgia Law Review (Athens, Georgia)
Gaz. Pal.	La Gazette du Palais (Paris)
Harv. Envrnt L. Rev.	Harvard Environmental Law Review (Cambridge, Mass)
Harv. L. Rev.	Harvard Law Review (Cambridge, Massachusetts)
Harv. J. on Legis.	Harvard Journal on Legislation (Cambridge, Mass)
Hastings L. J.	Hastings Law Journal (San Francisco)
Hous. L. Rev.	Houston Law Review (Houston)
Ind. L. J.	The Industrial Law Journal (London)
Int'l Rev. L. & Econ.	International Review of Law and Economics (Guildford, England)
Is. L. R.	Israel Law Review (Jerusalem)
J. Contemp. L.	Journal of Contemporary Law (Salt Lake City, Utah)
J.C.P.	Juris Classeur Périodique, La Semaine Juridique (Paris)
JFT	Tidskrift, utgiven av juridiska Föreningen i Finland
J.L. & Econ.	The Journal of Law and Economic (Chicago)
J. Legal Studies	Journal of Legal Studies (Chicago)
J. Pol. Econ.	Journal of Political Economy (Chicago)
JuS	Juristische Schulung, Zeitschrift für Studium und Ausbildung (München and Frankfurt /A.M.)
JZ	Juristenzeitung (Tübingen)
La. L. Rev.	Louisiana Law Review (Baton Rouge, Louisiana)
Law & Contemp. Probs.	Law and Contemporary Problems (Durham, North Carolina)
Law & Phil.	Law and Philosophy. An International Journal for Jurisprudence and Legal Philosophy (Dordrecht)

LU	Proposal of the Parliamentary Standing Committee on Civil-Law Legislation
Melb. U.L. Rev.	Melbourne University Law Review (Parkville, Victoria, Australia)
Mich. L. Rev.	Michigan Law Review (Ann Arbor, Michigan)
Mo. L. Rev.	Missouri Law Review (Columbia, Missouri)
Modern L. Rev.	Modern Law Review (London)
Minn. L. Rev.	Minnesota Law Review (Ann Arbor, Michigan)
M. & W.	Meeson & Welsby (London; a part of English Reports)
NAT	Nordisk administrativt tidsskrift (Copenhagen)
NFT	Nordisk Försäkringstidskrift (Stockholm)
NOU	Norges Offentlige Utredninger (Oslo)
NJA	Nytt Juridiskt Arkiv avd. I (case law)
NJA II	Nytt Juridiskt Arkiv, part II (legislature)
NJW	Neue Juristische Wochenschrift (München, ...)
N.Z.L.J.	The New Zealand Law Journal (Wellington)
N.Z.R.L. Rev.	New Zealand Recent Law Review
Nw. U.L. Rev.	Norhwestern University Law Review (Chicago)
N.Y.U. L. Rev.	New York University Law Review (New York)
N.Z.U.L. Rev.	New Zealand Universities Law Review (Wellington)
Ohio St.L. J.	Ohio State Law Journal (Columbus, Ohio)
Osgoode Hall L.J.	Osgoode Hall Law Journal (Downsview, Ontario)
Oxford J. Legal Stud. prop.	Oxford Journal of Legal Studies (Oxford) Proposition
Rev. intern. dr. comp.	Revue internationale de droit comparé (Paris)
Rev. trim. dr. civ.	Revue trimestrielle de droit civil (Paris)
Rev. barr. can.	La Revue du Barreau Canadien
R.G.A.T.	Revue générale des assurances terrestres (Paris)
R.G.D.	Revue générale de droit (Ottawa, Canada)
San Diego L. Rev.	San Diego Law Review (San Diego, California)
Seton Hall L. Rev.	Seton hall Law Review (Newark, New Jersey)
SOU	Statens offentliga utredningar (Stockholm)
S	Recueil général des lois et des arrêts fondé par J.-B. Sirey (Paris)
SvD	Svenska Dagbladet (daily paper; Stockholm)
SvJT	Svensk Juristtidning (Stockholm)
Tex. L. Rev.	Texas Law Review (St Austin, Texas)
TfR	Tidsskrift for Rettsvitenskap (Oslo)
Tulane L. Rev.	Tulane Law Review (New Orleans)
U.C.D. L. Rev.	U.C. Davis Law Review (Chicago)
U. Chi. L. Rev.	University of Chicago Law Review (Chicago)
U. Miami L. Rev.	University of Miami Law Review (Coral Gables, Florida)
U. Pa. L. Rev.	University of Pennsylvania Law Review (Philadelphia)
U. Tasm. L. Rev.	University of Tasmania Law Review (Hobart, Tasmania, Australia)
U. Toronto Fac. L. Rev.	University of Toronto Faculty of Law Review
U. Toronto L.J.	University of Toronto Law Journal (Toronto)
U.W. Ont. L. Rev.	University of Western Ontario Law Review (Ontario)
Va. L. Rev.	Virginia Law Review (Charlottesville)
Val. U.L. Rev.	Valparaiso University Law Review (Valparaiso, Indiana)

VersR	Versicherungsrecht. Juristische Rundschau für die Individualversicherung (Karlsruhe)
Victimology	Victimologi: An International Journal
Yale L. J.	The Yale Law Journal (New Haven, Connecticut)
ZfV	Zeitschrift für Verbraucherpolitik, Journal of Consumer Policy
ZHR	Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht (Heidelberg)
ZRP	Zeitschrift für Rechtspolitik (München)
ZSR	Zeitschrift für Schweizerisches Recht (Basel)