Sport and Insurance – Tracks or Sidetracks?

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1 Preface

1.1 Introduction

This article is based on and tied together by two small incidents. The first incident concerns the story about a group of patients in a psychiatric hospital sitting in a long line peacefully occupied with basketwork. One of the male patients suddenly took a small wooden club used by the work and repeatedly hit the person sitting next to him on the head. When the unjustifiable character of his conduct was pointed out to him later on, he answered, "I have read the regulations of the hospital several times, and I have not found any prohibition of hitting others with a wooden club".[1] The other incident is less dramatic and concerns a talk I had a short time ago with a sport student who had hurt her knee during a handball match. She had reported the injury to her insurance company which had subsequently asked for further particulars relating to the course of the injury, among these whether the injury was caused by physical contact with an opponent. Now the student had become uncertain regarding what to explain to the insurance company, and she therefore asked for a piece of good advice. In my opinion, the best advice is to request people to tell the truth. However, in this case the problem was which of the 'truths' would result in financial compensation.

These two incidents are just as simple as illustrative of the dissimilar problems connected with the relation between the rules of law (the norms) and realities and consequently also illustrative of the questions of tracks and sidetracks regarding sport and insurance dealt with in this article.

The story about the psychiatric patient illustrates the fact that in order to be capable of construing e.g. an act, an insurance contract or the regulations of a hospital, you must necessarily be acquainted with the non-pronounced assumptions of the act, the insurance contract or the regulations of the hospital. The non-pronounced assumption of the regulations of the psychiatric hospital is that it is

1 The story is borrowed from Stig Jørgensen, *Lovmål og dom*, Copenhagen 1975.

illegal to injure other persons without special permission. As a matter of course it stands to reason that such assumptions neither can nor ought to be 'entered into' the text of the act etc. The example also demonstrates the existence of a rule (the regulations of the hospital) that is not direct applicable to the concrete case. The fact that rules of law etc. are often not direct applicable, is a consequence of partly the fact that the language is an imprecise tool as frequently used words and sentences can be construed in several ways, and partly the fact that reality undergoes constant change and that it is thus impossible to make allowance for all the problems that may arise.

The story about the damaged knee shows how difficult it can be to formulate a rule (the accident definition of a standard insurance policy) which concerns a generally defined group of persons, if the conduct is abstractly defined, and which can be understood by so-called ordinary people. The issue is about the policy-holder's possibility of predicting his legal rights. If the insurance companies administrate the rule leniently or at random, it is of course impossible for the policy-holder to have his legal rights cleared up.

1.2 Concretizing the Subject

Different problems (tracks/sidetracks) connected with the accident definition of a standard insurance policy (below designated the accident definition) will be treated below.

It is the assertion of this article that the accident definition of today either has already developed - or is now developing - to a pure rule of discretion as in several cases Ankenævnet for Forsikring (The Insurance Complaints Board) and the courts seem to form a free choise as to the question whether a (sport) accident falls within the accident definition. The risk that the estimate in so doing becomes unprincipled and discretionary is obvious - resulting in heavy losses on the account of legal protection (sidetrack).

The accident definition has been treated in detail in Danish legal literature. However, so far all efforts have been used to convince the readers that practice is a predictable product of stringent constructions of the conditions of the accident definition.[2] In my view the theory of law is on a sidetrack in this context. I therefore think that theory of law ought to base on the fact - described below - that the accident definition is extremely imprecise and that the definition draws up a number of conditions with an obscure extent in a complicated text.[3] In spite of this fact there are, however, some cases that are easier to class (subsume) with the accident definition than others. It can be maintained that the accident definition has a vague core area (the lexical meaning of the words) and a circumscribing area (the meanings of the words outside the core area). These last cases present a special interest in this context as several of the words/concepts forming part of the accident definition have apparently lost their original meaning, cf. below.

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2 *Cf.* Carsten Sennels, *Den traditionelle ulykkesdefinition*, Juristen 1996, p. 100 ff.

3 *Cf.* Carsten Sennels, *op.cit.*, p. 101 f.

2 The Accident Definition

Pursuant to the standard insurance policy for personal accident insurances, an accident covered by the insurance is explained as "an accidental, independent of the insured's will, sudden and from outside coming impact on the body, which causes provable injury to the body".

Apart from small linguistic shades, this accident definition is identical with the ones in Norway and Sweden.

The accident definition is stated in a standard insurance policy elaborated by the company; however, application of the socalled contra proferentem rule by the construction of the accident definition will probably be considered as unsupported. According to this rule an obscure provision will be construed against the insurance company. It is true that the accident definition has an obscure extent, but it is nevertheless used by most insurance companies in the Nordic countries. This is not an ambiguous condition which the policy-holder has properly construed otherwise than the company. In this case the contra proferentem rule would be an easy - but unauthorized - short cut (sidetrack) for the policy-holder.

As noted above, theory of law has so far been occupied with construeing the individual words figuring in the definition ('accidental', 'sudden' etc.). The procedure used was to start from selected types of damage/injury and consequently argue for or against grouping them with the accident definition.[4] Below, selected practice will be explained and analysed in order to confirm or deny the assertion that the accident definition has already developed - or is now developing - to a pure rule of discretion.

3 Practice. Casuistry

3.1 The Water Polo Case

(Forsikrings- og erstatningsretlig domssamling, 1998.36 ØLD - Law reports)

On August 2nd 1995 a policy-holder A noticed a claim to his insurance company S regarding an injury received on July 18th 1995. The notice of claim contained the following wording: "During a 'water polo game' being part of the entertainment at the swimming pool and in which both children and adults participated I was so unlucky - in an attempt to catch the ball - that it hit my hand in such a way that the joint on the 5th finger of my left hand subsequently drooped at an angle of 90^{o}." In a questionnaire from S, A answered the question whether something unusual, unexpected or accidental had happened in connection with the injury in the following way: "It was accidental that the ball hit the hand so unluckily as described." Consequently, S refused to cover the injury pleading that it was not a case of accident as the injury was not caused by "an accidental, independent of the

4 *Cf.* also Ivan Sørensen, *Den private syge- og ulykkesforsikring*, 1989, p. 67.

insured person's will, sudden and from outside coming effect on the body, which causes provable injury to the body".

A brought S's refusal before The Insurance Complaints Board which decided that S had to admit that it was in fact an accident to be covered by the insurance. The wording of the decision is as follows:

> "The majority of the Board finds that it is an accident within the meaning of the insurance policy and that the reported injury is therefore to be covered by the insurance. The majority of the Board points out that it is the practice of many companies to cover an injury like the one in question - also with the definition of an accident stated in the insurance conditions of this case."

As S dit not want to comply with this decision, A brought an action against the company at Østre Landsret (the Eastern High Court) claiming that S be ordered to admit that the accident falls within the arranged insurance.

In the court-room A explained that during a holiday in France he had played water polo with some other adults and children in the 'low' end of the swimming pool out of regard for the children. During the game he had tried to catch the ball while he was standing with his arms stretched upward. The ball hit his little finger which was thereby broken backwards. Today the finger was stiff and could not be bent at all. A alleged that it was true that "he had fully consciously used his hand in order to catch the ball, but the cause of the injury was the fact that the ball hit his hand in a harmful way. Therefore the injury is not to be regarded as 'volitional' or expectable from a reasonable construction of the insurance terms in question". Moreover, A alleged that the concept of will as it was invoked by S had to be seen in the light of the latest practice of The Insurance Complaints Board and "construed in favour of the policy-holder, irrespective of the wording" in the definition of the concept of accident used by S.

Against this S alleged that the insurance conditions contain a specific claim that the impact on the body has to be independent of the insured's will. "Consequently, the concept of will is not connected with the injury, but with the impact on the body. In the present case the impact has been intentional. A deliberately tried to catch the ball with his hand, and he thus desired the impact of the ball on his hand. The injury is an expectable consequence of the process started intentionally by A. No other special circumstances have caused or contributed to the injury except the fact that the ball hit the hand which was the plaintiff's intention." S furthermore called attention to the fact that it is difficult for a layman to understand the accident definition in the insurance conditions, but that the construction has been established by more than 60 years' practice. And S concluded by stating that "consumer-political considerations cannot be relevant in relation to the insurance contract. There is no legal instances in support of the transformation in the practice of The Insurance Complaints Board."

The majority (two judges) in the Eastern Hight Court sustained A's claim stating the following reasons (my italics):

> "The definition of the concept of accident in the insurance conditions has to be construed considering what incidents the insured can reasonably expect to have covered as an accident. The injury of the plaintiff's finger caused by the ball hitting it in a detrimental way is found not to be included under what he could regard to be

> the most probable result of his attempt at catching the ball. Consequently, we find that the injury in question has to be covered by the insurance."

The minority (one judge) found for the plaintiff:

> "The court must agree with the plaintiff that an injury of a finger as a consequence of the finger being hit by a ball while the hand was held upwards with the intention of catching the ball - this fact undeniably being the only cause for the injury - cannot be regarded as an accident in the way it has to be perceived according to the accident definition stated in the insurance conditions, which cannot be construed as claimed by A ..."

In its decision The Insurance Complaints Board attaches decisive importance to the fact that it is the practice of many insurance companies to cover an injury as the one in question even if it does not evidently fall within the accident definition (cf. "also with the definition of an accident stated in the insurance conditions of this case"). Consequently, the Board does not construe the accident definition. The majority in the Eastern High Court does not construe the definition either, but attaches decisive importance to "what incidents the policy-holder can reasonably expect to have covered as an accident". This is an instance of a (pure) reasonableness/fairness evaluation in which - owing to the brief ratio decidendi of the judgment - it is impossible to see to what factors or motives the majority has attached importance. However, the minority construes the accident definition as being "independent of the insured's will" and finds that the injury is not included under the definition. The minority thus applies what legal theory would usually call a traditional construction of the accident definition.

It must be considered reasonable to conclude that the majority of the Eastern High Court either completely disregards the accident definition or only regards it as a rough definition of the concept of accident.

3.2 The Ski Case

(Endorsement for Insurance No. 14 of August 12th 1996, Case No. 39.830)

The policy-holder A, who had taken out a personal accident insurance in the company S complained to The Insurance Complaints Board of S's refusal to cover a reported injury. S had refused to pay the claims pleading that the reported sequence of events was not an accident within the meaning of the policy. A had stated in the notification form sent to S: "Fell while skiing". A's ligamenta cruciata had been teared. S asked A for further particulars, which a.o. contained the following description: "While skiing I lost my balance and fell. I immediately felt that my left knee was damaged." After that S refused to cover the injury, pleading that overbalance resulting in a fall cannot be regarded as an accident within the meaning of the insurance conditions, as it is not a case of an "from outside coming impact". Subsequently, the consultancy firm R was involved in the case, and in a letter R

argued that a skier coming from the rear caused A's loss of balance. However, S did not consider that these last explanations could be taken into account in the decision.

The decision of The Insurance Complaints Board says:

> "The Board has to take into account that the injury of the complainant's knee was caused by the very fall. The majority of the Board finds that it is therefore an accident in the meaning of the insurance conditions ..."

As it appears, it is not possible to see to what aspect the Board attaches importance as it uses a descriptive (describing) form of language. However, it is a question of characteristics which greatly depend on an evaluation that is hidden from the reader in this case.

> Corresponding ski cases have been submitted to Den sociale Ankestyrelse (The Social Appeals Board) in relation to industrial injuries.[5] Arbejdsskadeforsikringsloven (The Industrial Injuries Act) (Consolidation Act 1996.789) has no definition of the concept industrial injury, but by the administration of the Act the traditional accident definition is applied.[6] In one of the ski cases a ski guide made preparations for a picnic for the guests at a ski resort, and in this connection he was skiing slowly down an ordinary blue piste in excellent visibility. When the left ski hit a lump of snow or ice and then crossed the right ski, the insured fell and thus sprained his left knee. The Social Appeals Board concurred in Arbejdsskadestyrelsen's (The National Board of Industrial Injuries) recognition of the incident as an accident as the incident had to be considered as exceeding what the insured had to be prepared for in connection with the task in question. In another ski case The Social Appeals Board based its decision on the fact that the insured, when skiing, fell because his ski - in an attempt to escape - hit another skier felling in front of him whereupon he rolled down an approx. 6 m high steep slope. The skies were not released by the fall, and the insured injured the anterior ligamenta cruciatas and meniscuses in both knees. By the fall he was struck unconscious for a short period. The National Board of Industrial Injuries had refused to recognize the injury on the grounds that it is to be expected that skiing involves a risk of falling. The Social Appeals Board changed the decision into recognition as the incident was considered to exceed what he had to be prepared for in connection with the task in question.

In such cases one ought to be wary of maintaining that the decisions made by The Insurance Complaints Board and The Social Appeals Board are based on a standard of reasonableness. However, if you assume - as The Insurance Complaints Board does - that a fall while skiing must always be regarded as an accident, you have let the accident definition yield to pragmatic considerations, for it is difficult to see that a.o. the condition of a "from outside coming impact" has been fulfilled. It also applies to the two decisions made by The Social Appeals Board, in which the grounds are hardly distinguishable from the ones given in the water polo case ("are to be expected in connection with the job in question" - "can reasonably expect to have covered as an accident"), however, without using the word reasonableness.

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5 *Cf.* Frank Bøgh Madsen, *Nyt fra Ankestyrelsen*, No. 3/1999, p. 7 ff.

6 *Cf.* Jørgen Verner a.o., *Idræt & Jura*, 1997, p. 78 f.

The decisions are manifestations of pragmatic considerations, and pragmatic considerations are - as you will know - ultimately a manifestation of reasonableness.

3.3 Twist Injuries

The cases of the socalled 'twist injuries' illustrate in an excellent way the difficulties caused by the application of the accident definition, including the variable course ('rolling/wavering course') followed by The Insurance Complaints Board.

Twist injuries are common within the types of sport (e.g. handball) in which the game is built up using entirely calculated and intentional turnings which often cause twisting of the knee and subsequent injuries.

In several cases The Insurance Complaints Board established that twist injuries fell within the accident definition, cf. *case No. 27.179* of April 2nd 1991, *case No. 31.059* of June 22nd 1992, and *case No. 31.382* of June 22nd 1992. *Case No. 27.179* was about an injured ligamenta cruciata caused by the injured's shoe "sticking to the rubber surface of the floor". It appears from the case that The Insurance Complaints Board had asked The National Board of Industrial Injuries how it construed the accident definition. The National Board of Industrial Injuries answered that by the evaluation it attached importance to the fact that "the injury was caused by a sudden incident". In *case No. 31.059* the insured demonstrated a 'lay-up' for the pupils during a sport lesson. In this case too "the shoe stuck to the floor" resulting in twisting of the right knee. Referring to *case No. 27.179* The Insurance Complaints Board established that it was a case of accident even if the insurance policy incorporated the proviso that twist injuries were not considered as accidents! In *case No. 31.382* the insured injured his ligamenta cruciata by twisting his knee during a football game on a gravel court. The decision of The Insurance Complaints Board says,

> "According to the complainant's description of the accident it happened as the foot remained in the gravel or mud resulting in twisting of the knee as he intended to take the ball from a opponent. In conformity with The Insurance Complaints Board's assumption in decision No. 27.179 the incident must be regarded as a case of accident."

This practice suddenly changed in 1994, cf. *case No. 35.958* in which a handball goalkeeper injured his knee by twisting ("the leg simply remained standing"). The insurance company's construction that the injury did not fall within the accident definition was accepted. The Insurance Complaints Board admitted that the injury would have been regarded as an accident according to the previous practice but stated,

> "It is now the conception of the Board that injuries happened as described cannot be regarded as having been caused by a sudden and from outside coming impact on the body, if there are no special circumstances like for instance physical contact with other persons, contact with holes or obstacles on the ground etc. ...".

In its decision The Insurance Complaints Board adduced no special reasons in support of the changed course, but it is hardly wrong to maintain that the new construction conforms better to the wording of the accident definition. However, the fact that I regard the decision as being a step backward, compared to the previous practice of The Insurance Complaints Board, is due to the following two circumstances. *Firstly* the fact that in their policies or practice several Danish and Swedish insurance companies no longer presuppose an from outside coming impact, but only presuppose suddenness.[7] In a manner of speaking, the development has overtaken the new practice of The Insurance Complaints Board along the inside. The *second* fact is that the Supreme Court in *other* cases (non-sport injuries) has almost explained away the precondition of "an impact coming from outside", cf. the next paragraph. Totally, it can therefore be concluded that the practice of The Insurance Complaints Board relating to twist injuries is out of touch with the development in the insurance field as well as legal practice.

3.4 Non-sport Injuries (UfR 1997.683 HD, the 'Bicycle Judgment')

Not only in cases of sport injuries, the accident definition seems to develop into a rule of choice. This is illustrated by a supreme court judgment in which the insured sustained severe injuries by felling off his bicycle.

It appears from the case that A took out an accidence insurance with the insurance company B. The insurance policy says a.o., "The insurance covers accidents, understood as an accidental, independent of the insured person's will, sudden and from outside coming impact on the body, which causes provable injury to the body". In 1988 A fell off his bicycle and was so severely hurt that his injury degree was specified as 25%. In support of his statement, A maintained that it was a case of accident within the meaning of the insurance conditions as it was an accidental, independent of A's will, sudden and from outside coming impact on the body - viz. the contact with the asphalt - causing a provable brain injury. The insurance company denied liability, a.o. claiming that A had not been subject to an accident within the meaning of the insurance conditions as he had not stated any external cause having resulted in the injury.

From the wording construction of the accident definition the insurance company seemed to have a good case. However, the Supreme Court recognized his falling off the bicycle - without any visible from outside coming impact - as an accident. The Supreme Court a.o. stated the following reasons,

> "According to the evidence [A] has incurred a brain injury by falling off his bicycle and hurting his head. From its outer objective manifestation such injury is an accident, and no external causes rendering probable something different have been stated."

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7 The insurance conditions of the Swedish insurance company FOLKSAM still comprise the traditional accident definition; however, a letter subjoining the insurance conditions describing the practice of the insurance company mentions: "To us it is self-evident that knee injuries caused by twisting are cases of accident".

By using the phrase "its outer objective manifestation", the Supreme Court applies the traditional concept of accident in the sense of a sudden incident with an unfortunate ending.[8] The Supreme Court had previously put this construction on the accident definition. In the supreme court judgment *UfR 1997.88* a dentist working with a power chain saw in his garden was injured: the most extreme joint of his left thumb had to be amputated, 25% of the joint and several ligaments on his left forefinger were sawn off, and the result was that he could no longer perform the functions of a dentist. The insurance company considered that the accident was not to be covered by the insurance and that the insured's injury was not caused by an incident that was accidental and independent of the insured person's will. The supreme court judgment a.o. says, "The Supreme Court allows that according to its outer objective character the [insured's] injury takes the form of an accident and is therefore to be covered by the insurances ...".

The supreme court judgments seem to support the conception that nowadays a more discretionary or realistic evaluation of the accident definition is made. A few writers regard the lack of claim for "an impact coming from outside" as an expression of the fact that it is rather a question of the claim for a sudden and from outside coming impact having been modified, i.e. that when it has been proved that it is a case of fall, it is read into the situation that the fall has been caused by a from outside coming impact in case no other circumstances making probable other causes have been stated.[9] The supreme court judgments stated above *may* be construed as decisions in which the demand for evidence has been modified. However, there is only little difference between the two cases: that the courts *read into* the situation that the fall is caused by an impact coming from outside, or that the courts *explain away* the demand for a from outside coming impact. In both cases the result is a 'broader' accident definition.

4 Closing Remarks

On the basis of the material treated it may be difficult to decide whether the accident definition has become a pure rule of discretion. As I see it, however, there are indeed signs that the accident definition is developing into a rule of evaluation. In my opinion this is the proper course - assuming that practice searches guidance within theory of law. This is only possible in case theory of law recognizes the existence of a rule of evaluation, for only by so doing theory can utilize the fund of legal thinking expressed by practice. Theory of law has to bind the sheaves cut by legal practice. The main task of the theory will be a critical and systematic treatment of the rule of evaluation standard. In the reported supreme court judgment the insurance company alleged that the construction of the accident definition has been determined by more than 60 years' practice. However, both society and sport have undergone a transformation during these 60 years. In Denmark of today there are more than 1.5 mio organized members within the field

8 *Cf.* Leif Rasmussen, *Mod et realistisk arbejdsulykkesbegreb,* UfR 1999 B 425.

9 *Cf.* Frank Bøgh Madsen, *Sportsskader, Nyt fra Ankestyrelsen*, No. 3/1999, p. 7, and same, in Idrætsjuristen, Årsskrift for foreningen Idrætsjura 2000, p. 37.

of sports, to which must be added all the unorganized sportsmen. Consequently, the demand for accident insurances is immense. Insurance companies ought to cover damages which the customers wish to have covered and for which they are willing to pay. After 60 years the present accident definition ought to be pensioned off and replaced by a more dynamic and realistic (accident) definition covering the requirements of the sportsman of today. A suitable outward gateway for the treatment of this great question is the reported judgment from the Eastern Division of the Danish High Court. The starting point must therefore be what a sportsman of today can reasonably expect to have covered by his insurance. With such transformation of the accident definition the sidetracks will be abandoned, being of benefit to all sportsmen.