Alternative Compensation Systems

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1 Introduction

A The Nordic Countries

One of the main topics to be discussed at the XIth World Congress of the International Association for Insurance Law (AIDA) - to be held in New York in October 2002 - is the development of mechanisms for compensating injury or damage to third parties that are alternative or supplemental to traditional tort liability and liability insurances in areas other than automobile accidents. Each country submits a report that describes the alternative compensation systems of the country by answering a number of specific questions set up in a questionnaire. The purpose of this report is to present the alternative compensation systems in the Nordic countries in a more coherent fashion that stresses the underlying policy goals and the technique used to implement them.

Naturally, there is a reason for making a comprehensive study of the Nordic countries. They have a long tradition – upheld for about 100 years – of co-operating in the legislative process within private law, resulting in genuine inter-Nordic legislation in some areas. Also within the law of torts proposals for such legislation were put forward in the 1940s and 1950s, but even though they did not result in inter-Nordic legislation, the proposals left their mark on the partial codification of law subsequently effected in the individual countries (Norway in 1969, Sweden in 1972, Finland in 1974 and Denmark in 1984). However, codification was only partial, and there are also differences between the issues codified by the individual countries and the form of legislation. Therefore, large parts of the law of torts continue to be developed by judicial precedent, which also plays a major role in the areas where legislation lays down some general principles only. The countries' joint approach to tort law issues is also reflected by the fact that judicial precedent frequently leads to uniform results in the individual countries.

Particularly concerning damages for personal injury, it is also significant that the Nordic countries have elaborate social security systems that cover a large share of the economic losses sustained in accidents resulting in personal injury, particularly

medical expenses and loss of income. The above-mentioned legislation in the Nordic countries contains rules regulating the co-ordination between social security benefits and damages, which generally means that social benefits are deducted from the amount of damages, which thus cover "net losses" only. Moreover, as a main rule, the relevant public authority does not have a right of recourse against a tortfeasor who is liable in damages. As a result of this system, damages play a fairly moderate role in cases involving personal injury, both from the injured party's and tortfeasor's point of view. In practice, the main consequence is that the cost of insurance premiums for relevant liability insurance policies is much lower than it would have been in the absence of such a system.

Thus, as far as personal injury is concerned, the main function of damages is to provide supplementary cover in order to fill the various "gaps" and limitations in the social security system, in particular to compensate for loss of income over and above the limits set by the social security system, as well as to compensate for so-called non-pecuniary consequences of an injury, such as pain and suffering, permanent injury and the like.

In fulfilling this supplementary function, the Nordic countries – like other countries – endorse the principle that full compensation should be paid for the individual loss, but any international comparison between the levels of compensation clearly shows that this principle conveys very little about how damages are assessed in practice. As a main rule, the legislation in the Nordic countries merely sets up a general framework for the assessment of damages, such that the details are left to the courts. Compared to other countries, this practice results in a fairly low level of damages, but a genuine comparison is made difficult, largely by the differences between the social security systems and the principles for co-ordinating social security benefits with damages. Therefore, the amounts of damages payable for non-pecuniary losses can best be compared, and here it is obvious that the level in the Nordic countries is at the lowest end of the scale. This is most evident in Danish legislation, which lays down more specific rules on the assessment of damages than the other Nordic countries.

It is important to keep this background in mind, because there is no doubt that it has had significant influence on the development of alternative compensation schemes in the Nordic countries. For one thing, it has meant that it has been less costly than it would otherwise have been to implement compensation schemes for personal injury in a number of areas where the compensation fully, or at least approximately, corresponds to the damages payable according to the general law of torts. For another, it has meant that deliberations about the preventive function of tort law have played a lesser role in the development, as the possible preventive effect of tort law was already limited by the fact that the damages payable only cover a – in the circumstances – moderate share of the losses due to personal injury.

It is possible that this situation is changing in a way that will make it more difficult in future to introduce similar compensation schemes in other areas. The development of alternative compensation schemes began in earnest in the Nordic countries in the 1970s (pioneered in Sweden), at a time when the welfare state was being built up and it was therefore conceivable that further development of the social security system could essentially make the rules on damages for personal injury superfluous. However, society's resources and the desire to alleviate the

heavy tax burden have curbed this development, and thus increased the importance of other compensation. Moreover, the appropriateness of covering a major share of the losses attributable to accidents involving personal injury by tax-financed, social security benefits is increasingly being questioned, also from a preventive point of view. Finally, increasing international traffic puts some pressure on the Nordic countries to approximate their compensation levels to those applicable in the other (European) countries. It is likely that this pressure will at some point result in harmonization initiatives from the EU (the only direct intervention to date being the directive on product liability). If this happens, the Nordic countries' previous common understanding in this area will undoubtedly be challenged. However, another possible development is that initiatives may be taken to extend the application of the Nordic alternative compensation schemes, as described below, to the rest of Europe via the EU.

B Questionnaire

The questionnaire that the countries have been asked to answer is worded as follows:

The questionnaire consists of two parts. The first part (1) is a general introduction to the subject of the study and on the limitations of the questionnaire. In the second part (2), you are asked to describe the voluntary as well as compulsory compensation schemes for third party damages as referred to in the introduction which exist in your country. Please answer the questions for each of the relevant alternative schemes in force or being developed.

1 Introduction

The subject for the study are the alternative mechanisms for the compensation of third party damages which have emerged as a complement or an alternative to liability and liability insurance in areas other than automobile accidents. Damages caused by automobile accidents however can be taken as a point of departure. In many countries indeed, compensation mechanisms have developed with respect to automobile accidents, which are not based on traditional liability or liability insurance. *If* a country has in this area something else than only an individual liability insurance, it *might* also have compensation systems going in the same direction for other kinds of accidents. The general reporters want to focus more particularly on industrial and medical accidents and environmental damages, without excluding interesting developments in other areas.

The study is limited to the compensation of third party damages which could conceivably also be dealt with by liability law. The cost of obligations towards the government, e.g., with respect to the clean-up of one's own property is to be dealt with. First party insurance is not considered, except as a point of reference.
The questionnaire is further limited to schemes in which private insurers play or can play a role. Social security is not examined.

Types of alternative compensation schemes

There is a broad range of compensation mechanisms other than liability and liability insurance. They can be of a voluntary or compulsory, public or private nature. With respect to the functions they fulfill, the following distinctions can be made.

a. Some mechanisms *replace or complement liability insurance* by providing a guarantee for the payment of compensation due on the basis of liability law. In some cases liability insurance is *backed up* by a mechanism to which the victim can have recourse in the event compulsory liability insurance has not been taken out or in the event the liability insurer is insolvent (compare the function of automobile compensation funds in a number of countries). In areas where liability insurance is not available, *depositary funds* may be used to accumulate the assets necessary to cover certain, often predictable, future liabilities. Private insurers offer *funding* contracts which make available to the policyholder the amounts needed to live up to certain future obligations. Compensation may also be provided by *guarantee funds* financed by levies paid by a group of persons who create a more or less similar risk. In some events private insurers fulfill a similar role. An insurance for a third party beneficiary can provide compensation in the event of insolvency of the person taking out the policy. An example is the Swedish Pollution Victims Insurance which is to be taken out for the benefit of potential pollution victims by certain categories of industrial enterprises.

b. Other compensation schemes constitute an *alternative or complement to the liability system* itself. Their intervention is *not based on the prior establishment of liability*. Whether or not compensation can be obtained is directly determined by the rules governing the distribution of the contributions (premiums, levies, taxes) accumulated by the participants to the scheme. Here again, automobile funds can serve as an example in so far as they provide compensation in the event no liability arises because a driver who caused an accident is exempted from liability by force majeure or has not been identified. There exist comparable compensation schemes in other areas than automobile accidents. In certain cases, accident insurance is taken out by the operator of a dangerous activity for the benefit of the potential victims of his activities as yet unknown third party beneficiaries. An example is to be found in the Belgian industrial accident law under which the employer is granted a large degree of immunity under liability law but has the obligation to take out a (direct) insurance for the benefit of the employees. The Swedish patient insurance provides, without prior individual liability having been established, compensation for medical injuries and is (primarily) financed by the providers of medical services (nearly all public authorities). Especially in the environmental area, various *compensation funds* financed by levies on products or activities provide compensation, more particularly where the limits of individual liability are exceeded or where causation cannot be established. Private insurance can play a role here as well. The Swedish Pollution Victims Insurance e.g., provides compensation for environmental damages in the event no liability arises by reason of the statute of limitation or because the enterprise which caused the damage has not been identified.

The above classification, although useful in describing the functions of the alternative compensation schemes, does not fully reflect reality. In practice, several compensation schemes will fulfill various functions at the same time and may remain closely linked to liability law.

2 Questions

1. Name of the alternative compensation scheme.

2. Describe in general the compensation mechanism and indicate its function, taking into account the indications given in the introduction. What are the policy objectives of the scheme?

3. Is the operation of the scheme the result of a voluntary undertaking or does it result from legislation? Please provide further information on its statutory of contractual basis.

4. What is the area of application of the compensation scheme? Describe the type of operation covered, the nature of the incidents giving rise to damages and the type of damage covered.

5. What are the (other) substantive conditions under which compensation can be obtained from the scheme?

6. What benefits are available to the beneficiaries? If monetary compensation is provided for, is the amount of the compensation *limited* by a maximum payment per incident, or a maximum per victim individually?

7. Does the victim have to establish that he has exhausted his remedies under tort law before having access to the compensation scheme?

8. Does the victim maintain the right to sue a tortfeasor on the basis of liability law rather than having recourse to the compensation scheme?

9. Can the victim, after having had recourse to the compensation scheme, sue a tortfeasor on the basis of liability law for the damages exceeding the benefits received from the scheme?

10. Can the operator of the compensation scheme exercise recourse on the basis of liability law against any party contributing to the scheme whose operations have caused the damage compensated by the scheme?

11. Can the operator of the compensation scheme exercise recourse on the basis of liability law against other parties than those mentioned in 10?

12. By whom and according to which procedural rules are claims for benefits payable by the compensation scheme decided upon?
Can a victim bring suit against the operator of the compensation scheme before the ordinary courts?

13. How is the compensation scheme financed? Who is contributing to the scheme? Is contribution compulsory or voluntary? On what basis are the premiums or other contributions determined?

14. What is the actual importance of the scheme? Please provide information on the number and type of cases in which it actually provided compensation and on the amounts distributed.

15. Please make any policy comments on the scheme you deem relevant and which have not been dealt with in the previous questions. You may want to comment on elements such as the ultimate allocation of the losses, the preventive effect of the system, its potentiality to provide protection for the public at large or to allow potentially liable parties to limit their liabilities.

C Delimitation of Alternative Compensation Schemes

The framework of the study set by the questionnaire gives rise to doubt in several respects. When the questionnaire refers to compensation mechanisms that are an "alternative" to the usual liability in damages incurred by a tortfeasor according to the general law of torts, the question arises in which respects the scheme must be considered an "alternative". In principle, any deviation from the general law of torts could be considered an "alternative" compensation scheme. Moreover, according to the questionnaire the subject of the study is not only compensation schemes that are "alternative" in the sense that they *replace* liability in damages according to the general law of torts, but also schemes that *complement* tort law, particularly by providing financial security for the fulfilment of the injured party's claim for damages according to general tort liability rules.

Another question that arises is which rules can be deemed "general" tort liability rules. If a given compensation scheme does not deviate from what is classified as the general law of torts in the relevant country, it can obviously not be considered an alternative. If, for instance, *general* principles for imposing strict liability exist without legislation providing any special statutory basis herefor (as is the case in Norway, unlike in the other Nordic countries), such principles will be regarded as forming part of the "general" law of torts – and consequently, a compensation scheme based on such principles cannot be considered an "alternative".

In the introduction to the questionnaire, a distinction is made between systems that replace or complement *liability insurance* and schemes that are an alternative to or complement the actual *liability system*. A distinctive feature of the last-mentioned schemes should therefore be that their function is not based on the prior establishment of liability. However, in areas where traditional liability insurance has been introduced, the question of whether the tortfeasor's *personal* liability in

damages has been upheld will frequently be largely formal. Thus, the liability arising from automobile accidents (which, as mentioned in the questionnaire, is not part of this study) has been designed as "genuine" insurance schemes in some countries (e.g. Norway and Sweden), as the injury party's claim for compensation under the insurance policy on the automobile causing the accident is not conditional upon personal liability in damages, while such personal liability has been upheld in other countries (e.g. Denmark). However, when this liability is strict, insurance is compulsory and the injured party is entitled to bring a claim directly against the insurance company, any personal liability incurred by the tortfeasor does not have any actual practical importance (naturally assuming that the claim against the insurance company is equivalent to the claim that the injured party otherwise could have raised against the tortfeasor). The same applies to any personal liability that is limited to, e.g., certain instances of gross negligence, where it may also be a formality whether the tortfeasor has incurred liability towards the injured party or only towards the insurance company, based on a right of recourse. The decision whether to design a compensation scheme on the basis of (a certain degree of) liability in damages supplemented by (liability) insurance or as a "genuine" insurance scheme may depend on quite different considerations. For example, in the case of damage or injuries caused by certain public activities, one option is to give the relevant public authority the choice of being self-insured. In that case, it is necessary to hold the authority liable if it chooses not to take out insurance.

Thus, it is not possible to single out one individual criterion that can be used to define which compensation schemes are to be considered "alternatives" to the law of torts. However, a meaningful distinction must assume that the compensation scheme, to a lesser or greater degree, makes use of "techniques" other than those commonly used in the law of torts. The following deviations from the law of torts are particularly relevant:

(1) The injured party's entitlement to compensation under the scheme is *not* determined by means of a traditional description of the *basis of liability* (whether fault or strict liability). Instead, the entitlement is based on a description of the type of accidents or injuries covered by the relevant scheme, and this description consists mainly of objective criteria, or at least of objectified criteria in the form of specific requirements for a relationship between certain (business) activities and the relevant accidents/injuries. In this sense, the cover provided by the scheme has been made independent of any "personal" liability on the part of the tortfeasor in question. In those cases where the above-mentioned requirement for a relationship between the (business) activity and accident/injury goes beyond a simple causal relationship (in contrast to the "general" rules on strict liability), the requirements are "tailored" to the special complex of problems in the relevant area, which means that the entitlement to compensation does not fit directly into the liability categories of the general law of torts.

This does not exclude the possibility that *someone* may have incurred liability according to the general law of torts for damage or injury covered by the special scheme in question, so that the question of co-ordination between the cover under the scheme and the tortfeasor's liability arises. A scheme that *supplements* liability in damages will frequently – but not necessarily – assume that such liability exists.

(2) The compensation scheme is *financed* on a collective basis by the parties carrying on the business or activity to which the relevant accidents/injuries can be "attributed". The scheme will typically consist of insurance cover and/or one (or more) pools or public funds. Thus, it is not a question of traditional liability insurance, although an insurance scheme may be designed in such a way that it also covers the instances in which liability in damages is incurred according to the general law of torts.

All forms of "first party" insurance therefore fall outside the scope of this report, as such insurance is financed by the (potential) injured parties.

(3) The *compensation* payable under the scheme is *basically* on a par with the damages payable according to the general law of torts. In this way, the compensation scheme is distinct from the ordinary social security system – which is also characterized by a wider scope of cover than (1) and other financing than (2). However, this is only one point of departure. Thus, the scheme may (also) be "alternative" because the compensation payable deviates to a lesser or greater degree from the damages payable according to the general law of torts, e.g. in the form of special upper limits for the payment of compensation or thresholds set to eliminate trivial claims.

(4) Finally, the *claims handling process* may be alternative in the sense that special bodies are set up to handle the administration of the compensation scheme, including in particular the receipt of claims forms, the investigation into claims and the authority to decide cases. In contrast, a characteristic feature of the law of torts is that in principle it is not administered by its "own" bodies, as any disputes are basically resolved either by a settlement between the injured party and the tortfeasor/liability insurance company or in an ordinary lawsuit.

In fact, these are the points raised in the specific questions posed by the questionnaire. As stated above, an "alternative" compensation scheme need not necessarily differ from the law of torts in all four respects. In actual fact, the distinction consists of differences in degree only. However, any schemes that do not differ from the law of torts on any of these points cannot meaningfully be considered alternative. Consequently, a scheme based on strict liability supplemented by compulsory liability insurance is not *per se* an "alternative" to the law of torts, but the distinction becomes blurred in particular *if* the injured party is also entitled to raise a claim directly against the insurance company, *if* the tortfeasor's personal liability is removed or limited, and *if* the cover provided by the scheme (also) extends beyond any potential liability in damages.

In the introduction to the questionnaire, it is emphasized that focus should be placed more particularly on *industrial injuries*, injuries associated with *medical treatment* and the like and (certain) *environmental damage*. Moreover, as automobile accidents are to be excluded, as mentioned above, it becomes easier for the Nordic countries to delimit the subject of the report because compensation schemes that must undoubtedly be characterized as alternative in the sense that they all deviate from the general law of torts on most of the above-mentioned four points have been developed in precisely these areas, and very few others. However, in addition to

these schemes, it should also be mentioned that compensation schemes have been set up for the benefit of *victims of crimes* that deviate from the law of torts on the same points and which clearly serve the supplementary function referred to in the introduction to the questionnaire.

D A Nordic Model?

As mentioned previously, the development of alternative compensation schemes in the Nordic countries began in Sweden in the 1970s. During that decade, the so-called *occupational safety insurance* was introduced (1972), *patient insurance* (1975) and *pharmaceutical injuries insurance* (1978); the introduction of third-party motor insurance (1976) can also be considered part of this development. These compensation schemes were not developed on the basis of an overall plan, but resulted from some fundamental viewpoints on the design of the compensation system, particularly within the area of personal injuries, as expressed in the legislative history of the Swedish Liability for Damages Act (from 1972). The main viewpoint was that the general law of torts was an inexpedient compensation mechanism, and that instead the aim should be to develop insurance schemes that were better designed to meet injured parties' need for compensation that encompassed social policy objectives, a rational use of resources, as well as simplified, efficient and quick claims settlement, etc. Therefore, in principle, the development should not continue on the basis of the law of torts, particularly not in the form of introducing new rules on strict liability. Instead, *collective insurance schemes* tailored to meet the requirement for compensation in the relevant area and directly benefiting the injured party, regardless of whether anybody was liable in damages, should be developed.

At the time these viewpoints were put forward, occupational safety insurance was already taking shape, and the subsequent patient and pharmaceutical injuries insurance schemes were a natural continuation. A common feature of these schemes was that they were not set up by legislation, but on a *voluntary* basis (however, under the careful attention of the legislature) and that the insurance schemes were *collective*, as the parties carrying on the relevant activity (the two sides of industry in the case of occupational safety insurance, the providers of health services in the case of patient insurance and the drug manufacturers and importers in the case of pharmaceutical injures insurance) thus assumed "liability" that extended beyond the liability according to the general law of torts. This system of compensation schemes is frequently designated the "*Swedish model*" (e.g. as described in the book *Compensation for Personal Injury in Sweden and other Countries*, 1988, pp. 17-78).

The question is whether it is also possible to speak of a common *Nordic* "model".

To some extent, the development in Sweden has spread to the other Nordic countries. The influence is seen most clearly in the *patient and pharmaceutical injuries schemes*, as schemes similar to the Swedish one have been introduced in all the Nordic countries – first in Finland (cover for pharmaceutical injuries in 1984 and for patient injury in 1987), then in Norway (cover for patient injury in 1988 and pharmaceutical injuries in 1989) and finally in Denmark (cover for patient injury in

1992 and pharmaceutical injuries in 1996). The design of the schemes varies as appears from the following, and in no cases have the Swedish schemes been directly copied. However, the influence from Sweden is a clear manifestation of the common understanding between the Nordic countries, as mentioned in section A above. When considering reforms in an area like this, it is established practice in all the countries to make a careful investigation of the schemes applicable in the other Nordic countries, for one thing because experience from one country can often be used as a direct basis for drafting schemes in the other countries. Therefore, the schemes applicable in the other countries can all be considered variants on the themes introduced as a result of the Swedish pioneering efforts. However, the opposite also applies. When Sweden replaced its voluntary, collective patient insurance scheme by a statutory scheme in 1997, the design of the new scheme was influenced by the development in the other Nordic countries. The same applies in Norway, where replacing the temporary, voluntary patient injury scheme by a statutory scheme is currently being considered. Thus, this development seems to have culminated in the introduction of statutory patient insurance schemes in all the Nordic countries, a process that has developed without any actual formalized co-operation, but is characterized by mutual inspiration and common use of the experience gained.

The patient and pharmaceutical injuries schemes are also a feature *specific* to the Nordic countries. At least, in the general form existing here, they are not known to have any exact parallel in any other country, apart from New Zealand (where the cover for "medical accidents" is actually part of an even more comprehensive scheme). In this sense, it is therefore meaningful to discuss the existence of a Nordic "model", even though its design, to some extent also in Sweden, deviates from the original *Swedish* model.

In contrast, the existence of special *industrial injuries* compensation schemes is not a feature specific to the Nordic countries. Therefore, in this area, the special Nordic feature is that two of the countries (Sweden and Norway) have developed compensation schemes that *supplement* the existing industrial injuries compensation schemes and whose aim is to replace the supplementary cover otherwise obtainable under the general law of torts. However, these schemes have fewer common features than the schemes referred to above, both in terms of their origin and design, and perhaps this is one of the reasons that they have not spread to the other Nordic countries. Thus, a distinctive feature of the Norwegian scheme is that it was intended to be an alternative to the *assessment principles* of the general law of torts, as it is characterized by a more *standardized* determination of compensation. This is also a characteristic feature of the Danish law of torts in general, and as such it has since been considered also in Norway.

Finally, the existence of a special compensation scheme for the benefit of *victims of crimes* is not specific to the Nordic countries, either. However, it must presumably be considered a special feature that the determination of compensation under these schemes is based on the general law of torts, so that the compensation payable is generally equal to the damages that the victim could have claimed from the tortfeasor. Thus, this scheme can actually be said to provide compensation on a par with the schemes mentioned above, as it has generally proved possible, as mentioned in section A above, to design the various compensation payments in

such a way that the level of compensation payable is, in principle, equal to the damages claimable under the general law of torts. Therefore, this can also be considered a characteristic feature of the Nordic "model".

The above-mentioned compensation schemes essentially cover *personal injury* only. To date, the scope of the Nordic model has not extended beyond the above-mentioned areas of injury, and no genuine interest has been shown in extending it to other categories of personal injury. The possible reasons for this will be discussed in more detail in section II below, but so far the connection with the point made in section A above should be noted: Today, the costs of an extended right to compensation at a level corresponding to the damages payable according to the general law of torts will, all other things being equal, be higher than when the above-mentioned compensation schemes were introduced. Moreover, the desire to uphold tort liability for preventive reasons (in particular), or at least to attach greater weight to preventive viewpoints when financing compensation schemes, may also have increased the misgivings about a further replacement of tort liability by genuine insurance schemes.

Therefore, the reforms of recent years have affected the area of personal injuries to a lesser degree. On the other hand, compensation for damage to *the environment* has attracted increasing interest in step with the recognition of such damage and its impact on society. All the Nordic countries have more or less extensive rules on strict liability for environmental damage (which, as mentioned in section B, does not mean that this part of the law of torts qualifies as "alternative"). But here the similarity between the Nordic countries stops. However, two of the Nordic countries, Sweden and Finland, have introduced schemes (Sweden in 1989, Finland in 1999) that *supplement* tort law by guaranteeing compensation in a number of instances where claims for damages cannot be enforced. Such schemes do not exist in Denmark and Norway. However, in 1999 Denmark introduced a scheme intended to give the *authorities* easier access to reclaiming their expenses for certain environmental damage. No similar scheme exists in the other Nordic countries.

2 Common Report

A Introduction

As appeared above under section I, D, the alternative compensation schemes in the Nordic countries provide cover for *industrial injuries*, *patient injury, pharmaceutical injuries*, injuries associated with *crime* (victims of acts of violence, etc.) and (certain) *environmental damage*. An outline of these schemes is given in the tables in section B below, which are divided into the above-mentioned five categories of injury and damage.

The objective is to comment on and discuss these alternative compensation schemes, not only across frontiers, but also across their area of application. Therefore, this report will only deal with the basic features of the compensation schemes and not with details about the individual countries' schemes. The aim is to determine, from a bird's-eye view, to which extent *characteristic common features of the schemes can be ascertained and serve as a basis for and contribute to a*

discussion of the advantages and disadvantages of the Nordic "model". Obviously, the more common features that can be ascertained, the more pertinent it is to discuss the existence of a Nordic "model" that has wider ramifications than the community between the countries discussed in section I, D, and the more reason to raise the general question as to whether this model is to be recommended, and thus worth considering by other countries.

These issues are dealt with in section C below, based on the outlines contained in section B, both sections being systematized in accordance with the list of questions posed in the questionnaire. As mentioned above, the individual compensation schemes are discussed cross-sectionally, but the compensation schemes for environmental damage differ so much from the other schemes (particularly because personal injury is generally not involved) that they are dealt with separately towards the end of section C.

B Schematic Survey of Alternative Compensation Systems in the Nordic Countries

Industrial injuries

	Denmark	Finland	Norway	Sweden
1. Name	Industrial injuries insurance ("Arbejdsskade-sikring")	Industrial injuries insurance; Occupational Disease Act. ("Olycksfallsför-säkring, Yrkes-sjukdomslag")	Special social security rules; Industrial injuries insurance ("Særregler i trygd; yrkes-skadeforsikring")	(1) Industrial in-juries insurance ("Arbetsskadeför-säkring") (2) Occupational safety insurance ("Trygghetsför-säkring")
2. Objective, function	Insufficient protection afforded on the basis of fault liability. To avoid actions for damages. Making compensation a cost of the production.	To guarantee compensation independently of fault liability and other conditions for tort liability.	To combine accident and liability insurance to supplement the (special) social security benefits. To avoid actions for damages – loss spreading – to simplify causation and evidence issues.	The purpose of (2) is to supplement (1) to improve com-pensation payments and avoid actions for damages based on fault liability.
3.Voluntary/ compulsory	Compulsory	Compulsory	Compulsory	(1) Compulsory (2) Insurance on the basis of (volun-tary) collective agreement
4 + 5. Area of application and other conditions warranting compensation	Any employ-ment relation-ship. No cover for transport between home/ workplace Accidents, occupational diseases.	Any employ-ment relation-ship. Cover for transport between home/ workplace Accidents, occupational diseases.	Any employment relationship. No cover for transport between home/ workplace. Accidents, occupational diseases.	Any employment relationship + the employer himself. Cover for tran-sport between home/workplace; this does not apply to (2) if the injury is covered by the motor insurance system. Accidents, occupational diseases, other influences from working environment

Industrial injuries *continued*

	Denmark	Finland	Norway	Sweden
6. Amount of compensation	Permanent injury, loss of earning capacity, loss of supporter: same level as general law of torts; however, lower income maximum. No cover for temp. loss of income, pain and suffering.	Only pecuniary loss and only up to certain limits.	Same as law of torts (no cover for "punitive damages" (oppreisning); however, special standardization for future loss of earning capacity, permanent injury and loss of supporter.	(1) No cover for temp. loss of income. Otherwise: full cover for loss of income up to certain maximum. (2) Temp. loss of income and pain and suffering: certain limitations (unless tort liability is established). Otherwise: same as law of torts.
7. Obligation to invoke general law of torts first?	No	No	No	No
8. Right to invoke general law of torts first?	No	Yes	Yes (but no practical importance)	No
9. Supplementary cover provided by general law of torts?	Yes	Yes	Yes	No
10. Recourse against contributor to the scheme?	No	Yes	No	No
11. Recourse against third party tortfeasor?	No	Yes	Yes	(1) No (2) Yes
12. Compensation scheme operator	National Board of Industrial Injuries – Social Appeals Board. Ordinary courts of law.	Insurance company – Industrial Injuries Board – Social Insurance Court. Supreme Court.	No particular operator: Insurance company. Ordinary court of law.	(1) Social Insurance Offices – County Administrative Court of Appeal – Supreme Administrative Court. (2) Insurance company – board – arbitration.

Industrial injuries *continued*

	Denmark	Finland	Norway	Sweden
13. Financing	Ordinary insurance premiums. Contributions in case of occupational disease.	Ordinary insurance premiums (subject to some regulation).	Ordinary insurance premiums.	Levy/premium payable as certain percentage of payroll cost.

Injuries to patients

	Denmark	Finland	Norway	Sweden
1. Name	Patient insurance ("Patientforsikring")	Patient injury ("Patientskade")	Comp. for patient injury ("Pasientskadeerstatning") (expected statute)	Patient insurance ("Patientförsäkring")
2. Objective, function	Extended right to compensation as compared to fault liability. Easier access to compensation.	Extended and more precisely defined right to compensation. To avoid lawsuits based on gen. law of torts.	Extended right to compensation. Easier access to compensation.	To improve patients' right to compensation. To avoid complex fault liability issues.
3. Voluntary/ compulsory	Compulsory	Compulsory	Compulsory	Compulsory
4+5. Area of application Conditions warranting compensation	Only public hospitals, as a main rule. Only bodily injury. Experienced specialist standard, retrospective reasoning in case of alternative treatment option, failure of apparatus, general reasonableness test.	Public health service and private practice. Experienced specialist standard, failure of apparatus, infection, accidents, general reasonableness test.	All hospitals and authorized health service personnel. Fault or failure (no experienced specialist standard), failure of apparatus, infection.	All public and private health and hospital services. Experienced specialist standard, retrospective reasoning in case of alternative treatment option, failure of apparatus, reasonableness test in case of injury due to infection, certain accidents.
6. Amount of compensation	Same as law of torts (however, only if the comp. payable exceeds 10,000).	Same as law of torts (however, no comp. for injuries of a trivial nature).	Same as law of torts (however, only if the comp. payable exceeds 10,000; no cover for "punitive damages" (oppreisning))	Same as law of torts (however, small deductible and high maximum amount).

Injuries to patients *continued*

	Denmark	Finland	Norway	Sweden
7. Obligation to invoke general law of torts first?	No	No	No	No
8. Right to invoke general law of torts first?	No (in case of product liability: yes)	Yes	Yes (however, not against public authorities)	Yes
9. Supplementary cover provided by general law of torts?	No; see (6)	No; see (6)	No; see (6)	Yes (no use of limitations, see (6), in case of clear establishment of liability).
10. Recourse against contributor to the scheme?	Only against employees, in case of intent.	Only in case of intent or gross negligence.	Only in case of intent or gross negligence.	Only in case of intent or gross negligence.
11. Recourse against third-party tortfeasor?	Yes	Yes	Yes, in case of product and third-party motor liability	Yes, in case of product liability or automobile accidents
12. Compensation scheme operator	The Patient Insurance Ass. – The Patient Injury Complaints Board. Ordinary courts of law.	Patient Insurance Centre – Patient Injury Board. Ordinary courts of law.	Norwegian Patient Injury Compensation (incl. board). Ordinary courts of law.	Insurance company – Patient Injury Board. Ordinary courts of law.
13. Financing	Ord. insurance premiums (or self-insurance).	Ord. insurance premiums (subject to some regulation).	Ord. insurance premiums.	Ord. insurance premiums.

Pharmaceutical injuries

	Denmark	Finland	Norway	Sweden
1. Name	Compensation for pharmaceutical injuries ("Lægemiddel skadeerstatning")	Pharmaceutical injuries insurance ("Läkemedelsförsäkring")	Pharmaceutical injuries liability ("Legemiddelansvar")	Pharmaceutical injuries insurance ("Läkemedelsförsäkring")
2. Objective, function	To extend the right to compensation beyond product liability rules (particularly relative to the concept of defects).	To avoid the difficulty in proving fault liability and causation. Possibility of compensation for known side-effects.	To extend the right to compensation beyond product liability rules. Loss spreading.	To avoid the difficulty in proving fault liability and causation. Possibility of compensation for known side-effects.
3. Voluntary/ compulsory	Compulsory	Voluntary	Compulsory	Voluntary
4 + 5. Area of application Conditions warranting compensation	Approved drug dispensed by a doctor, etc. Only bodily injury. Compensation for side-effects beyond what a patient can reasonably be expected to endure.	Drug produced or imported by a member of the Pharmaceutical Injuries Insurance Pool. Only bodily injury. Compensation for side-effects beyond what a patient can reasonably be expected to endure.	Drug produced or imported by a member of the Pharmaceuticals Liability Ass. Comp. for side-effects beyond what a patient can reasonably be expected to endure.	Drug produced or imported by a member of the Pharmacuetical Injuries Insurance Only bodily injury. Compensation for side-effects beyond what a patient can reasonably be expected to endure.
6. Amount of compensation	Same as law of torts (only if the comp. payable exceeds 3,000; high maximum).	Same as law of torts.	Same as law of torts (only a maximum in case of serial injuries).	Same as law of torts (high maximum, however).
7. Obligation to invoke general law of torts first?	No	No	No	No
8. Right to invoke general law of torts first?	Yes, in case of product liability.	Yes	Yes	Yes

Pharmaceutical injuries *continued*

	Denmark	Finland	Norway	Sweden
9. Supplementary cover provided by general law of torts?	No; see (6)	No; see (6)	No; see (6)	No (any claim is to be assigned to the insurer).
10. Recourse against contributor to the scheme?	No; see (13)	?	No	Yes (by virtue of the assignment of claims for damages, but this right is not exercised).
11. Recourse against third-party tortfeasor?	Yes, in case of product liability.	?	Yes	Yes (by virtue of the assignment of claims for damages, but this right is not exercised).
12. Compensation scheme operator	The Patient Insurance Ass. – The Pharmaceutical Injury Complaints Board. Ord. courts of law	Insurance company (pool) – Pharmaceutical Injuries Board. Arbitration.	Insurance company. Ord. courts of law.	Insurance company – Pharmaceutical Injuries Board. Arbitration.
13. Financing	The State	?	Ord. insurance premiums.	Levy based on the market shares of pharmaceuticals companies.

Victims of crimes

	Denmark	Finland	Norway	Sweden
1. Name	Comp. to victims of crimes (“Erst. til ofre for forbrydelser”)	Criminal Injuries Act (“Brottskade-lag”)	Comp. to victims of crimes (“Erst. for personskade ved strafbar handling” - expected statute)	Criminal Injuries Act (“Brottskadelag”)
2. Objective, function	To ensure payment of the claim against the perpetrator.	To ensure payment of the claim against the perpetrator.	To ensure payment of the claim against the perpetrator. Counterpart to humane criminal policy.	To ensure payment of the claim against the perpetrator.
3. Voluntary/ compulsory	Compulsory	Compulsory	Compulsory	Compulsory

Victims of crimes *continued*

	Denmark	Finland	Norway	Sweden
4 + 5. Area of application	Personal injury (and certain property damage) in case of violation of the Criminal Code.	Personal injury (and certain property damage) in case of criminal offences other than automobile accidents.	Personal injury caused by a criminal offence in the form of violence or coercion.	Personal injury (and certain property damage) in case of criminal offences.
Conditions warranting compensa-tion	Legal claim to compensation (with exceptions, however). To be reported to the police; claim for comp. to be set up in the course of criminal proceedings.	Legal claim to compensation (with exceptions, however). To be reported to the police.	Legal claim to compensation. To be reported to the police; claim for comp. to be set up in the course of criminal proceedings.	Legal claim to compensation. To be reported to the police.
6. Amount of compen-sation	Same as law of torts (however, more deductions in respect of social and first-party insurance benefits, etc. Proposal to abolish these deductions).	Same as law of torts, but subject to special maxi-mum amounts and deductions in respect of other compensation.	Based on the gen. law of torts, but comp. only up to certain maximum amount and not for minor injuries; deductions to be made in respect of other compensation.	Same as law of torts, but subject to deductions in respect of other compensation; maximum limits and a deductible.
7. Obligation to invoke general law of torts first?	No (however, claim for comp. to be set up in the course of criminal proceedings).	No (however, as a main rule, a case cannot be decided until a judgment on damages has been pronounced).	No (however any criminal or any civil proceedings must be concluded first).	No
8. Right to invoke general law of torts first?	Yes	Yes	Yes	Yes
9. Supplemen-tary cover pro-vided by general law of torts?	Yes	Yes	Yes	Yes

Victims of crimes *continued*

	Denmark	Finland	Norway	Sweden
10. Recourse against contributor to the scheme?	(Not relevant)	(Not relevant)	Not relevant)	(Not relevant)
11. Recourse against third-party tortfeasor?	(Against the perpetrator)	(Against the perpetrator)	(Against the perpetrator – injured parties are to assign claims for comp. corresponding to the comp. payable by the State.)	(Against the perpetrator)
12. Compensation scheme operator	Compensation Board. Ord. courts of law.	Government office + Criminal Injuries Board. Social insurance court.	The county – Compensation Board. Ord. courts of law.	Criminal Injuries Board. Not ord. courts of law.
13. Financing	The State.	The State.	The State.	The State.

Environmental damage (no alternative scheme in Norway)

	Denmark	Finland	Sweden
1. Name	Contaminated Soil Act ("Jordforureningslov")	Environmental damage insurance ("Miljöskadeförsäkring")	(1) Environmental damage Insurance ("Miljöskadeförsäkring") (2) Environmental restoration insurance ("Saneringsförsäkring")
2. Objective, function	To ensure the public authorities' right to the reimbursement of expenses for clean-up, etc., even though the polluter is not liable according to the law of torts.	To provide cover for environmental damage when comp. cannot be collected from the polluter or the polluter cannot be identified.	To provide cover for environmental damage/ clean-up when the polluter is unable to pay. Cover also provided by (1), when the polluter cannot be identified or liability has become statute-barred.
3. Voluntary/ compulsory	Compulsory	Compulsory	Compulsory

Environmental damage *continued*

	Denmark	Finland	Sweden
4 + 5. Area of application Conditions warranting compensation	All (new) soil contamination. Business activities: Exception only in case of force majeure. "Private" business activities: Generally only in case of fault liability; however, strict liability in case of contamination from oil tanks.	Damage comprised by the Environmental Damage Compensation Act, as well as expenses for the prevention of such damage or restoration of the environment.	(1) Personal injury and property damage in case of pollution (as defined in the Environmental Code). (2) Expenses for clean-up measures of an urgent nature to counteract environmental damage, as well as expenses for investigations.
6. Amount of compensation	Actual expenses for clean-up, etc. Contamination from oil tanks: Compulsory insurance cover up to a certain maximum.	Based on the gen. law of torts, but subject to special maximum limits.	Based on the gen. law of torts, but subject to special maximum limits.
7. Obligation to invoke general law of torts first?	No	No – only proof to the effect that the polluter cannot pay (or be identified).	No - only proof to the effect that the polluter cannot pay.
8. Right to invoke general law of torts first?	Yes	(The scheme is only applied when the polluter cannot pay)	(The scheme is only applied when the polluter cannot pay)
9. Supplementary cover provided by general law of torts?	Yes (but not relevant).	(The scheme is only applied when the polluter cannot pay)	(The scheme is only applied when the polluter cannot pay)
10. Recourse against contributor to the scheme?	(Not relevant)	The injured party must assign his claim for compensation to the insurance company.	The injured party must assign his claim for compensation to the insurance company.
11. Recourse against third-party tort-feasor?	Yes (subrogation to any claim for comp. that the owner may have against the polluter).	(Not relevant)	(Not relevant)
12. Compensation scheme operator	Ord. public authorities. Ord. courts of law.	Insurance company (or insurance centre) – Environmental Insurance Board Ord. courts of law.	(1) Board – arbitration (2) Arbitration
13. Financing	Only special insurance for contamination from oil tanks.	Ord. insurance premiums.	Levy on the basis of the hazards involved when granting environmental approval.

C Cross-sectional Replies to Questionnaire

2 Objectives and Function

One of the main objectives of all the compensation schemes is to *improve the chances of injured persons to obtain compensation* as compared with the general law of torts. Such improvement may be achieved *either* by *expanding the right* to receive compensation beyond the liability requirement set by the law of torts in the area concerned (i.e., chiefly, fault-based liability for industrial injuries and medical treatment injuries, and - especially for pharmaceutical injuries - the product liability law requirements that the injury must be caused by a *defect* in the product), *or* by improving the chances to actually *obtain the compensation* that is payable according to the general law of torts (especially relevant to victims of acts of violence but also in some cases of environmental damage).

This objective is quite trivial in itself, however, as it does not in itself help explain why improvements have been adopted precisely for these types of injuries, or why they have been implemented by introducing alternative compensation schemes. Improvements could undoubtedly to some extent also have been achieved through traditional law of torts mechanisms, such as by increasing the basis of liability to strict or quasi-strict liability.

The main reason for not choosing law of torts "mechanisms" as a basis for extending the entitlement to compensation is to *avoid* basing the payment of damages on individual "*confrontations*" between claimant and tortfeasor (or the tortfeasor's employer), as such confrontations at worst take the form of actions for damages between the two parties. This was, also originally, a major reason for introducing special *industrial injuries* compensation schemes, where the provision of cover, although it did not "match" the general law of torts level, often meant that the employee's right to claim damages from the employer was limited or excluded. These limitations have been phased out (quite simply because there is no reason why persons sustaining industrial injuries should be placed in a worse position than others who would be entitled to claim damages under the general law of torts). What is now needed, is to *avoid* the consequence that compensation *over and above* the basic industrial injuries insurance cover, should depend on the employer's liability in tort and thereby involve "confrontations" between employee and employer. The point of view is that it would be unfortunate to strain the legal relationship between the parties by actions for damages in which their interests are necessarily opposite.

Exactly the same point of view prevailed in relation to *patient injuries*. Formerly, they did not attract much attention, partly because claims for damages were rare, and it was therefore not considered problematic to regulate them by means of the general law of torts, including the principle of fault. The situation is now considerably altered, however. Medical developments have fostered treatment options, but also risks, that previously did not exist, and at the same time increased patients' expectancy of a favourable result of their treatment. The breakdown of doctors' authoritative position and an increasing claims consciousness have reduced patients' reluctance to claim compensation for treatment-related injuries. In some countries this has caused an explosion in the number of actions for damages

with an ensuing violent cost increase (of liability insurance premiums, of the use of "defensive" medical treatment, etc.), and – especially in the United States – this "medical malpractice crisis" has produced initiatives that are mainly aimed at limiting the scope of liability according to the general law of torts. A similar "crisis" did *not* occur in the Nordic countries, in part because damages do not play the same role as in other countries; see above under section I, A. In the Nordic countries, the objective could rather be termed preventive, i.e. aimed at altering the compensation system so as to *prevent* the trend seen in a number of other countries. It was moreover recognized that the limited number of actions for damages in connection with medical treatment invariably shrouded a large number of unrecorded instances, i.e. that in actual fact considerably more injuries entitling patients to fault-based damages actually occurred, but for which claims were (for many different reasons) never raised. Thus, it was ascertained that the fault-based tort system did not actually operate as intended, and that problems would (also) ensue *if* it did. One of the reasons that the principle of fault did not work was undoubtedly the "confrontation mechanism" inherent in the law of torts. Doctors will invariably be on the defensive if compensation can be obtained only in case of fault. The principle of fault thereby prevents openness in the doctor/patient relationship, and, irrespective of their outcome, actions for damages do not promote relationships of trust, either.

In addition, the *application of the principle of fault creates special difficulties* in connection with medical treatment. It is often difficult to draw the line between fault and no-fault in this area, as medical decisions are frequently discretionary, and all treatment invariably involves a smaller or higher risk of complications. This applies to the use of drugs also, because there is always a risk of side-effects. For that very reason such a risk does not normally render a drug "defective" in the sense applied in product liability law, which is why the product liability of drug manufacturers etc. is of almost no practical importance. Liability for injuries related to the use of drugs would therefore, in practice, more frequently be based on the manner in which the drug is used, which leads back to medical malpractice liability. Thus, pharmaceutical injuries and treatment injuries are closely interrelated, which would cause problems of delimitation if only one of these types of injury were covered by a special compensation scheme. Besides, pharmaceutical injuries are almost tailor-made for an insurance scheme, as they typically involve risks that affect only a limited number of users, the incidence of which can be statistically calculated as the risk is in most cases well-known, but nevertheless acceptable because of the drug's beneficial effects. Conversely, if the risk is unknown, the possibility of recovering damages under product liability law is also limited, as most EU countries have availed themselves of the option provided by the EU Directive on product liability to exempt so-called development risks.

Finally, the medical treatment area implies certain *problems of proof*, especially as regards the *causation* issue. In this connection, the special feature of medical treatment is that the persons injured are *already* ill or injured. As for drugs, it might also pose a problem that several drugs are often used at once, making it difficult to trace the injury back to one particular drug. Thus, it is generally characteristic of the compensation systems adopted in the Nordic countries that the standard of proof of

a causal relationship has been *lowered* as compared with the standard set by the general law of torts.

The problems mentioned in relation to the operation of the principle of fault are probably less pronounced in connection with *industrial injuries*, but are also present here. In this area, the assessment of fault mainly concerns the extent of the employer's instructions for and supervision of the work – and it is always possible to allege that this *could* have been better handled, but the difficulty consists in assessing whether it *ought to* have been better handled. The problem of proving causation is especially relevant in connection with *occupational disease*, i.e. the issue of whether the injured person's work or working conditions were the cause of the disease. Because of this, industrial injuries insurance schemes operate with special assumptions about the causes of diseases that are known to occur in connection with certain working processes.

The situation is somewhat different as regards *victims of crimes of violence*. Special compensation schemes have been established in this area because of the difficulties such victims experienced in *recovering damages from the perpetrator*. The fact that the perpetrator typically is without funds to meet the obligation to pay damages poses a problem that can certainly arise in other contexts, too, but here there is a special difficulty because the *liability insurance* that may have been taken out does not cover liability for injury caused *intentionally*. In practice, liability for private individuals is fulfilled only by way of liability insurance, which is taken out by about 95% of all Nordic households as an integral part of an "insurance package" covering household goods etc. Victims of violence thus stand a much poorer chance of obtaining damages than do other groups of injured persons.

Thus, all of the above compensation schemes originate from, what are deemed to be, *limitations or weaknesses of the general law of torts*. Although these shortcomings may be said to be rather general, they are *especially pronounced* in the areas covered by the schemes. Moreover, they are not *only* related to the rules governing the basis of liability (the principle of fault), and it has therefore not been possible to solve them by merely increasing liability. The introduction of these schemes must therefore *not* be taken to express the viewpoint that these groups of injured persons are more "worthy" or more "in need" of compensation than others (although it must be admitted that such viewpoints are sometimes expressed, especially in respect of victims of acts of violence).

As mentioned above under section I, D, the compensation systems are not products of an overall plan, but, at the most, the outcome of a fundamental perception of the value of the law of torts as a compensatory instrument. Within this framework, the individual schemes have developed rather *pragmatically*, from practical considerations of how best to solve the compensation problem in a given area. It is quite natural that such reflections do not address the topic in a wider context, for instance by considering whether similar problems might exist in other areas. At any rate, this has not been deemed a relevant objection to the reforms: A good, partial reform is considered preferable to no reform and accordingly the possible need for (similar) reforms in other areas does not constitute a reason for omitting reforms in the area concerned.

This does not, of course, preclude the objection that there has been some arbitrariness as to which groups of injured persons have been "selected" for special

(or, for that matter, preferential) treatment in terms of compensation. It has, however, only to a limited extent been considered to propagate the alternative compensation schemes to other categories of injury, although it has been debated whether or not to introduce a scheme similar to the pharmaceutical injuries insurance for certain *other products* (especially chemical and/or technical products) or whether to introduce collective insurance schemes covering injuries sustained at *schools* and other child care centres.

These deliberations have not been taken far, and one of the reasons for this may be that the *problem of financing* them would probably be more pronounced in these areas. The heavy concentration of drug manufacturers facilitated the establishment of a (voluntary) collective pharmaceutical injuries insurance scheme. As mentioned above, drugs are moreover special in that they involve an *acceptable* risk of – even serious – personal injury. The operation of schools is, to a lesser degree than medical treatment, a *public* activity and there is no basis for claiming that the general law of torts does not function well in this area. It could, more appropriately, be argued that schools typically do not enter the picture at all, as there is rarely basis for any liability in damages. The severe application of the fault criterion to industrial injuries, inter alia, is not found in this area.

It is often maintained (also in the Nordic countries) that the various compensation systems, including the no-fault cover of injury caused by motor vehicles, have had the effect that the majority of all personal injuries, sometimes estimated at almost 90%, warrant the payment of compensation, and that it is, therefore, an anomaly in itself that similar compensation is not also granted for other types of personal injury. The prevalence of the alternative compensation systems is therefore adduced as an argument in itself for adopting similar schemes in areas that are today governed by the principle of fault, to the effect that the ultimate goal would be to provide cover for all kinds of personal injury – in principle corresponding to the system introduced in New Zealand, which made it possible to abolish tort liability for personal injury in general.

This is a misconception, however. It considerably overestimates the total number of accidents involving personal injury that fall under the areas covered by the special compensation mechanisms. Even when discounting minor injuries that do not require much medical treatment, (motor) traffic and industrial accidents jointly account for only about 30% of the total number of personal injuries, more or less irrespective of the seriousness of the consequences of an accident used as a search criterion in accident statistics (traffic accidents account for a much larger share of the more serious injuries, whereas the opposite is the case for industrial accidents). Each of the other types of injury dealt with (caused by medical treatment, acts of violence, etc.) only accounts for a few per cent of the total number of accident-related personal injuries. Therefore, in actual fact *far more than half, probably up to two-thirds, of all personal injuries do not fall within the scope of any special compensation scheme* – but only within the general principle of fault. A Danish study of the operation of the general law of torts has shown that only about 3% of persons injured in such accidents are awarded damages. Thus, it would evidently be far more costly than generally envisaged to expand the criteria for awarding compensation to encompass, in theory, all of these injuries (New Zealand has certainly discovered this to be true).

Besides the size of the costs, the question is also *how* and by *whom* a compensation scheme in other areas should be financed. The existing compensation mechanisms are financed either by insurance premiums paid by the "operators" of the business concerned, or by public means (i.e. ultimately by taxes), either because the business is operated by the public authorities (e.g. hospital treatment) or because it is difficult to point out another source of financing (e.g. mechanisms compensating victims of crimes of violence). For the more "diffuse" categories of accidents – in the home, in connection with recreational activities etc. – it is not possible to identify similar groups of tortfeasors on whom one might impose a (controllable) obligation to take out insurance. Any other way of financing such schemes, whether by first party insurance or taxation, would arouse opposition from social policy points of view: If the compensation is not financed by those who "cause" the accidents, why should persons injured by accidents be granted better compensation than victims of disease and other social contingencies?

Thus, the existing compensation schemes must (also) be regarded as manifestations of realistic awareness that the feasibility of financing such schemes imposes certain limits – which, as already mentioned, does not necessarily signify that those limits cannot be shifted. One must realize that the role of these schemes in the overall picture is, after all, in the main quite marginal. Least marginal is the occupational safety insurance, but Sweden has actually had to retreat precisely in this area. At the same time, it must be admitted that the financing issue has been regarded as a matter of whether the costs of the system are "acceptable", rather than from the angle of considering the "positive" effect such financing might have. In the areas that do not involve public activities there is, *in reality*, no fundamental difference between the way the alternative compensation schemes are financed and the financing of traditional tort damages, namely by payment of insurance premiums the size of which is, as a point of departure, determined according to general principles of insurance. Although more "internalization" of the costs of accidents has, therefore, only to a limited extent been a declared goal, it is open to discussion whether this, especially in connection with industrial and pharmaceutical injuries, is nevertheless a significant consequence of the systems; see the comments below under subsection 13.

3 Voluntary or Compulsory?

As mentioned above under section I, D, "the Swedish model" was originally characterized by, in principle, *voluntary* insurance schemes under which policyholders assumed increased liability without any obligation to do so. Especially the pharmaceutical injuries insurance showed, however, that the voluntary aspect was more formal than factual, as there was a latent "threat" that legislation would be adopted to regulate pharmaceutical injuries liability. It should also be noted that, in Denmark, the choice was influenced by Denmark's European Union membership, as the EU Directive on product liability only allowed special liability rules to be upheld, but not to be introduced.

The special advantage of the "voluntary" model was that it was more *flexible* than a scheme regulated by law, as it was more easily adaptable to the experience

gained (in that the insurance terms could easily be altered). This advantage was, of course, particularly important in the first stages, and the insurance terms were actually altered quite frequently.

The disadvantage of a voluntary scheme, however, is especially *the risk that not all businesses carrying on the activity concerned will join*. Thus, the voluntary model is best suitable (i) where there are only *few* "*providers*" of the activity causing the injuries concerned and (ii) where they are moreover *well organized* (as is the case in the pharmaceutical industry). If some businesses fail to join the scheme, there will either be no general cover (which will be hard to accept and unfortunate for the injured persons), or the participants must jointly provide cover for such "free riders" (which will be unsatisfactory for those who have to pay). These problems are part of the reason why Sweden switched to a statutory scheme in the patient insurance area. Thus it is hardly accidental that the prime examples of voluntary schemes are now the pharmaceutical injuries insurance schemes (in Sweden and Finland) and the occupational safety insurance (in Sweden, the prevalence of which has been ensured by founding it on a *collective* agreement between the two sides of industry).

Another possible drawback of a voluntary scheme is that, obviously, *it is not compulsory for the injured persons either* (although in Sweden the occupational safety insurance pretends to be, which seems debatable). The consequence of this is that injured persons *remain entitled to claim damages under the general law of torts* – and are accordingly entitled to *refrain from invoking the alternative compensation mechanisms*. *Whether* this is deemed a disadvantage depends on whether the aim is to obtain a *de jure* – and not only a de facto – *channelling* of claims to the alternative scheme; see the comments under subsection 8 below. Evidently, it has never been the intention that an injured person should be entitled to recover compensation (for the same loss) from both systems. Thus, a voluntary scheme must guard against this by requiring all injured persons invoking it to assign any claim for damages in tort to the insurance company etc. concerned. This may, however, both involve technical problems (especially by being in conflict with general rules that might limit the assignment of claims for compensation), and may leave the insurance company in the same situation as if it had been granted *recourse* against the tortfeasor. That, too, might be contrary to what is deemed desirable; see the comments under subsections 10 + 11 below. In other words, a voluntary scheme *can* never become an "alternative" to liability in damages to the same extent as a scheme regulated by statute, by virtue of its de jure channelling of claims to the scheme and its limitation, or even disallowance of recourse.

Finally, it should be mentioned that a voluntary scheme does not incorporate the same guarantees in respect of public access to information, an open debate and the weighing of interests as do reforms introduced by means of legislation. Accordingly, flexibility has its price in terms of lack of democratic control. Developments in Sweden show, however, that this is not necessarily a matter of an absolute either/or, as the public authorities can, both directly and indirectly, influence a voluntary scheme, including its introduction and design and its administration in practice.

4 + 5 Areas of Application and Other Substantive Conditions Warranting Compensation

There is considerable similarity in the delimitation undertaken in the Nordic countries as to which injuries are covered by the individual schemes.

The similarity is most pronounced for *pharmaceutical injuries*. The Nordic countries have all replaced (i.e. extended) the requirement of product liability law for the injuries to be caused by a "defect", by an assessment of whether the patient should reasonably have to endure the side-effect concerned, especially regarding the relationship between its seriousness and the seriousness of the disease the drug was used against. Apart from in Norway, it is moreover a general requirement that the injury must be bodily.

There are also extensive similarities as regards the cover provided for *victims of acts of violence*. The schemes are generally limited to personal injury caused by certain (rather serious) crimes. The most essential dissimilarity is that in Norway compensation is granted by way of "equitable" compensation, whereas, in the other countries, the victims have – at least as a general rule – a legal claim to compensation, i.e. compensation *must* be granted whenever the statutory requirements are met. However, a Bill recently introduced in Norway will bring Norway into line with the other countries in this respect.

As regards *industrial injuries* the main dissimilarity is, of course, that only Norway and Sweden have adopted compensation schemes *supplementing the basic industrial injuries cover*. The basic schemes generally have the form of special insurance schemes regulated by legislation. Norway is the exception to that rule, by having integrated their industrial injuries cover in the general social security system (in Norwegian: trygd), and this cover consists of various extensions and more lenient terms, etc., than those normally applying to general social security benefits. Thus, the basic cover provided in the countries varies considerably, including the scope of the benefits warranted. Therefore, the "need" for a supplementary compensation scheme also varies. Experience shows, however, that there is an interaction between the considerations about what cover the basic industrial injuries insurance should provide, and what should be covered by a possible supplementary compensation scheme. The Swedish industrial injuries insurance, e.g., does not include compensation for non-pecuniary loss, one of the reasons being that, at the time when this scheme went through its latest major reform, the occupational safety insurance *already existed* and warranted compensation for that type of loss. Another reason, however, was the fundamental viewpoint that, as "part" of social security, industrial injuries insurance should cover pecuniary losses only. This reflects a well-known ambivalence to industrial injuries cover: It is claimed to be both a social security scheme and a compensation scheme, and the emphasis chosen will often determine the details of an industrial injuries scheme, especially in terms of benefit levels.

Apart from the benefit levels of the basic industrial injuries cover, there are no major fundamental differences as regards the cover provided in the Nordic countries, neither in terms of which employment relationships are covered, nor in the delimitation of the "industrial injury" concept (including occupational diseases); the latter seems more widely defined in Sweden than in the other countries,

however. A feature specific to the Swedish scheme is that its cover extends to self-employed persons. Another major difference is that in Sweden and Finland, but not in Norway and Denmark, injuries occurring during *transport between the home and the workplace* are generally covered. As it is common to all the Nordic countries that (motor) traffic accident compensation is granted on a no-fault basis, the major issue is whether these accidents should be borne by the industrial injuries insurance, or by the third-party motor insurance. One might imagine, therefore, that the issue of whether these injuries are included under the industrial injuries insurance scheme would be decisive for whether the operator of the scheme would have recourse against a third-party tortfeasor, but these factors are not necessarily interrelated; see below under subsection 11.

The Norwegian industrial injuries insurance and the Swedish occupational safety insurance clearly have a *supplementary function* in relation to the basic industrial injuries scheme. In principle, their cover is as wide as that provided by the basic insurance schemes, however, with the modification following from the voluntary aspect of the Swedish scheme (which is actually limited to employers not governed by collective labour market agreements). In principle, both apply the same industrial injury concept as the basic insurance schemes. The supplementary function therefore relates to the amount of compensation paid, the fundamental aim being to offset the disparity between the benefits granted under the basic insurance cover and those warranted by the general law of torts; see below under the comments on subsection 6.

Finally, the dissimilarities between the Nordic countries are more pronounced as regards the *patient insurance schemes*. Only Denmark (as a main rule) limits the scope of cover to hospital treatment and injuries of a bodily nature (although it has been proposed to expand cover in both respects). More clearly than for the other types of insurance schemes, the criteria for entitling patients to compensation are variations on the criteria originally established in Sweden; see above under I, D. The major parameters of these criteria are: (i) A more objective assessment, compared to the rule of negligence, of whether the treatment etc. undertaken was correct (by application of a so-called "experienced specialist standard"); (ii) the provision of cover for the consequences of failing equipment beyond product liability law (and general rules of strict liability in tort); (iii) the subsequent realization that the injury might have been avoided through some alternative form of medical treatment (so-called "retrospective reasoning"); (iv) the provision of special cover for injuries caused by infections sustained by patients in connection with treatment; (v) a – more or less – general, discretionary reasonableness test that basically equals the test applied in the pharmaceutical injuries insurance schemes, see above; (vi) special cover for accidents occurring in connection with treatment etc.

These parameters allow for considerable variations. It appears that, in some aspects, each country has relatively far-reaching cover, whereas in other aspects cover is more restrictive. Generally, Finland seems to provide the widest cover, followed by Denmark (especially because of parameter (v)) and Sweden (where parameter (v) is applied more narrowly and (vi) more widely), while Norway, judged by the pending bill on a scheme regulated by law, is the most restrictive country.

Generally, the Nordic countries have thus succeeded in establishing an alternative to the principle of fault in the medical treatment area that has turned out to be both administrable in practice and has resulted in a reasonably understandable and acceptable delimitation of compensable claims. A considerably more far-reaching right to compensation would render the schemes very costly and difficult to administer, and a considerably more limited right to compensation would lead back, more or less, to the application of the principle of fault. Although the Norwegian bill is relatively close to doing that, it should also be considered that it is a characteristic feature of these schemes that they make it easier for patients to proceed with claims; see the comments on subsection 12 below. Another important feature is that the standard of proof of a causal relationship between treatment and injury has been lowered to a greater or lesser degree; see above under subsection 2.

6 Amounts of Compensation

The size of the compensation warranted by the alternative compensation schemes is decisive for *how* "alternative" they are. The most "alternative" schemes allow for compensation that is absolutely on a par with the damages an injured person would be entitled to claim under the general law of torts, as in that case there is no *need* to uphold the right to claim damages. If this right is nevertheless upheld, injured persons would, at any rate, not need to invoke the law of torts, see the comments on subsection 8, and the question as to whether claimants should be entitled to claim supplementary compensation under the general law of torts would then be irrelevant, see the comments on subsection 9 below. The relationship between the cover granted under an alternative compensation scheme and traditional liability in tort would then actually be limited to the issue of whether the operator of the alternative scheme should have recourse against a liable tortfeasor; see the comments on subsection 10.

If the compensation scheme is not rendered alternative in that sense, i.e. if the compensation warranted is not on a "par" with that granted under the general law of torts, then the following dilemma ensues:

Either it must be accepted that injured persons may claim *supplementary compensation under the general law of torts* in (all) situations where the injury falling within the scope of the special scheme was caused in a manner that gives rise to liability under the law of torts. To the extent that the alternative compensation scheme originates from theoretically or practically based criticism of the way the tort system operates, it would not seem very consistent to retain it to provide part of the compensation. The severity of this problem naturally depends on how large the disparity is between the compensation that is payable under the special scheme and that granted under the law of torts. One extreme situation would be that fundamentally *all* injured persons are affected by special limitations as to the compensation payable under the special scheme (e.g. a sizeable deductible or no cover for non-pecuniary losses); the reverse extreme situation would be that such limitations have only a marginal effect (e.g. by imposing a high ceiling on the income that is taken into account when calculating compensation for loss of income).

Or it must be accepted that injured persons *can obtain only the compensation provided under the alternative scheme*. In that case, injured persons would actually be left in a *worse* situation than other injured persons entitled to damages under the general law of torts, as they would have to make do with less than full compensation. Claimants are then, in a manner of speaking, offered (or forced to accept) a "deal": The "price" of *extending the scope of cover* provided by the special scheme is *waiving the prospect of obtaining full compensation* from a liable tortfeasor. The magnitude of this "price" naturally again depends on the relationship between the compensation paid under the two systems. If paying the price is not considered acceptable, but avoiding the above-mentioned alternative is desirable, then an intermediate solution might be for the authority administering the special scheme to refrain from applying its special maximum limits on compensation amounts in cases where the injury could otherwise give rise to a claim for damages against the tortfeasor. This solution also poses a dilemma, however, in that the authority concerned is *not* "*designed" to make tort liability assessments* (e.g. as to whether an injury was caused by fault).

The compensation schemes that are usually termed "*no fault" insurances* illustrate this dilemma. Unless the no-fault compensation warranted is more or less on a level with the damages payable under the law of torts (which is normally not the case), then any solution model will accordingly be problematic.

In that respect, the Nordic model clearly differs from the general "no-fault model" (although the "no-fault" designation is sometimes applied to it, nevertheless). It is characteristic of the Nordic compensation schemes *that the measure of compensation is based on the principles applied in the general law of torts*.

This is most evident in respect of all the *patient and pharmaceutical injuries insurance schemes*. Their common feature is that, generally, they do not contain special rules regulating the determination of compensation, but merely *refer* to the general law of torts for the assessment of damages applied to personal injury, loss of supporter, etc. The most important, general modification of that principle is that the patient insurance schemes (and in Denmark also the pharmaceutical injuries scheme) stipulate a certain "*triviality threshold"*, i.e. compensation is only granted for injuries of some seriousness (Denmark and Norway have a somewhat higher threshold than Finland and Sweden). This does not really constitute an exception from the general assessment principle, however, as this is *not* a "deductible", but only a certain threshold that must be exceeded to entitle injured persons to compensation; *once* this condition is met, the compensation is determined according to the general law of torts. Thus, the threshold mainly operates as a rationalization measure to save the authority concerned the burden of dealing with minor injuries. Conversely, especially the pharmaceutical injuries schemes stipulate special maximum amounts of compensation, but these limits are mainly due to insurance technique and, in practice, they do not limit the compensation in each individual case.

Compensation to *victims of crimes of violence* is also computed on the basis of the general law of torts, but these schemes tend to involve larger deviations from tort standards. This is partly because they impose actual limitations on the amounts of compensation payable (though not in Denmark) and partly, and in particular,

because state compensation is generally made subsidiary *to other compensation*, as benefits that would otherwise be payable in addition to tort damages are deducted. Thus, social considerations, i.e. the injured person's *need* for compensation, are clearly in evidence here, but not in the sense that the need is generally assessed by taking the injured person's (other) means etc. into consideration.

As mentioned above, the fact that the compensation granted generally equals the damages awarded under the general law of torts means that the issue of "supplementary" compensation normally does not arise; see below under subsection 9. For the same reason it is not very important to uphold injured persons' entitlement to invoke the general law of torts; see below under subsection 8. Only injured persons affected by the above-mentioned thresholds have to resort to the general law of torts, but these thresholds have been set at a level that renders this of no practical importance, either. Most people will not bother to raise such small claims. Similarly, victims of crimes of violence who are affected by the above-mentioned deductions naturally retain the right to claim the balance from the perpetrator, but the chances of recovering this part of the compensation are not great, either.

In actual fact, these compensation schemes replace liability in tort altogether. As mentioned above under section I, A, this characteristic feature of the Nordic model should be viewed against the background of these countries' relatively inexpensive personal injury compensation systems. In countries *where* the level of damages is higher, *where* the social security system covers a smaller share of pecuniary losses, and *where* recourse for social benefits etc. plays a larger role, the costs of adopting mechanisms corresponding to those established in the Nordic countries could undoubtedly be prohibitive. In addition, a comparatively fixed framework has been provided in the Nordic countries for the assessment of damages under the general law of torts, either by statute (this tendency is most pronounced in Denmark), or on the basis of leading court decisions (especially in Norway), or cases decided by the special insurance boards (especially in Sweden). Thus, determining compensation according to these standards has been left, with no theoretical or practical misgivings, to the public authorities or the bodies entrusted with the administration of the alternative compensation schemes; see below under subsection 12. Such misgivings would more probably be voiced in countries where the assessment of damages to a larger extent is based on specific, discretionary (court) decisions.

Probably, other countries would therefore be confronted with the dilemma mentioned above to a greater extent than the Nordic countries. To avoid this, it is essential that the general level of damages, especially for non-pecuniary losses, is not stepped up too much. As mentioned in section I, A, however, it will probably be increasingly difficult to uphold any major disparities in levels, especially within the European Union. Also the Nordic countries are under pressure to set higher compensation levels, and such higher levels are actually primarily reflected in the alternative compensation schemes (and motor vehicle insurance policies), as damages for personal injury, outside the area of these schemes, is of marginal importance only (see subsection 2 above). Lower social benefits and extended recourse herefor have the same effect (but in several instances the special compensation systems preclude recourse claims).

As regards *industrial injuries*, the basic industrial injuries cover illustrates the above-mentioned dilemma: Formerly, injured employees were not normally entitled to claim supplementary damages (especially not from the employer), but the trend has been towards dismantling such limitations. The outcome of this is free access to claim damages, also from the employer, for losses not covered by the basic industrial injuries scheme. As mentioned above, the scope of this cover varies from country to country, but a common feature is the existence of major limitations compared with the damages awarded under the general law of torts. Injured employees therefore have considerable interest in being allowed to claim supplementary damages, and the access to doing so is often facilitated by labour union assistance. Numerous lawsuits are brought to enforce such supplementary claims, especially in Denmark

Both the Norwegian industrial injuries insurance and the Swedish occupational safety insurance have been introduced in order to *avoid* that trend. The objectives of both are to supplement the basic cover (provided by the special social security rules and the industrial injuries insurance, respectively) up to the level warranted by the general law of torts. In this aspect these schemes are in line with the others, although the cover granted by the basic industrial injuries schemes naturally reduces their supplementary function. The occupational safety insurance scheme was actually the first step towards the Swedish model; see above under section I, D.

The Norwegian industrial injuries insurance and the Swedish occupational safety insurance scheme differ from the other schemes in that the compensation granted is not to the same extent on a par with the damages awarded under the law of torts. In *Norway*, this is because the compensation is subject to special *standardization* that does not exist in the general law of torts. Although it is assumed that the standardized compensation would in most instances (as a minimum) be on a level with individual damages warranted by the general law of torts, it is admitted that in certain cases it may be lower, for which reason claimants are still allowed to invoke the general law of torts (see below under subsection 9). In *Sweden*, the reason is that it has been deemed necessary, for economic reasons, to limit the compensation payable by the occupational safety insurance scheme. Thus, the Swedish solution thereby illustrates the other aspect of the above-mentioned dilemma, as these limitations are not to be applied in situations where the injured employee would be entitled to claim damages under the general law of torts. The authority operating the scheme is, therefore, forced to make fault-based assessments, although this is otherwise outside the scope of its task.

This development has rendered the overall industrial injuries compensation mechanisms in Sweden difficult to comprehend. They now combine three sets of rules: Industrial injuries insurance, occupational safety insurance and the general law of torts. This can hardly be said to have simplified the compensation mechanisms, and contrasts sharply with the development in other areas towards channelling compensation into one (alternative) compensation system. Considering that an alternative compensation system *already* existed in the area (i.e. industrial injuries insurance), it would have been simpler to expand it by bringing the compensation paid under *that* insurance scheme in alignment with general tort law damages. Experience shows, however, that for political reasons it can be difficult to reform an industrial injuries insurance scheme generally by means of legislation.

This means that voluntary solutions, e.g. based on collective agreements, can be the only alternative to no reform.

7 + 8 Right or Obligation to Invoke the General Law of Torts First

Considering the way the Nordic model is designed, it would be meaningless to render the cover provided by the alternative compensation mechanisms subsidiary to liability in damages under the general law of torts. Thus, injured persons are never required to try to recover damages first.

This issue accordingly occurs only in situations where the special scheme is aimed at *ensuring that the claim for damages* warranted by the general law of torts *is met*, i.e. in connection with *schemes benefiting victims of crimes of violence* (also see below as regards environmental damage). If (one of) the objective(s) of the scheme is to intervene where the tortfeasor is not able to meet his liability in damages, then the victim might be required to establish this fact in some way. It is, however, characteristic of the Nordic schemes in this area that they contain no special requirements in this respect.

A more controversial issue is whether the injured person is *entitled* to choose to claim damages under the general law of torts or, to reverse the question, whether injured persons are entitled to *opt out* of the alternative compensation mechanisms. As appears from the answers to question 8 in the above tables, the solutions adopted by the Nordic countries vary in this respect, but there is a clear *tendency to allow injured persons to opt out*. Denmark differs in this respect by making the industrial injuries insurance and the patient insurance schemes the primary compensation mechanisms in their respective areas, whereby compensation is *channelled "de jure"* to these systems. In areas where the special scheme is based on *voluntary* insurance, the injured persons are, of course, not bound by them (e.g. under the Finnish and Swedish pharmaceutical injuries insurance schemes), whereas in Sweden it is, as already mentioned, assumed that claimants are under an obligation to resort to the occupational safety insurance scheme for industrial injuries.

Where the compensation granted under the alternative mechanisms is determined by applying the general law of torts, it is of limited practical importance whether claimants are still allowed to invoke it. Claimants only very rarely resort to this option. This is undoubtedly attributable to the fact that, in terms of procedure, it is easier to obtain compensation under the alternative compensation schemes. Injured persons who resort to the alternative schemes do not have to produce evidence that the required basis of liability etc. exists. In practice, claims are therefore under any circumstances *channelled "de facto"* to the alternative compensation systems. The importance of this depends on the relationship between the cover they provide and the chances of obtaining damages under the general law of torts. Especially in the field of pharmaceutical injuries, tort law is of little importance, as it is very rarely possible to claim damages under product liability law, as stated above. It is, therefore, quite immaterial whether the right to invoke product liability law is upheld. It is generally assumed, however, that the EU Directive on product liability requires this option to be kept open.

Thus, maintaining the access to invoke the general law of torts could be taken as an indication that the issue is not important (and why, then, abolish it?), but also as an indication that a certain symbolic value is attached to this option. If the latter viewpoint is intended to signal a favourable assessment of the tort system, one might well ask how to reconcile this with the criticism that has been raised of the functioning of this system, which led to the establishment of the alternative compensation systems.

9 Right to Claim Damages According to the General Law of Torts for Losses not Covered by the Compensation Schemes

It follows from the comments made under subsection 6, *that this problem does not generally arise* under the Nordic model. Once an injured person has been awarded full compensation (i.e. compensation determined pursuant to the general law of torts) under the alternative compensation system, he is, of course, not entitled to claim additional damages from the liable tortfeasor. A compensation system cannot meaningfully be termed "alternative" if it takes the form of an insurance scheme that is designed to allow the benefits paid under it to be accumulated with a claim for damages against a liable tortfeasor.

Therefore, the right to claim supplementary damages is of practical importance only in areas where the compensation granted under the alternative compensation systems is limited, i.e. especially in the industrial injuries field in Denmark and Finland. Likewise it plays a certain role for victims of violence, but as stated above that right is of no *practical* significance.

10 + 11 Recourse Against the Parties Contributing to the Compensation Schemes and Against Third-party Tortfeasors

The alternative compensation systems are mainly financed by contributions, generally in the form of insurance premiums, made by persons carrying on the business to which the injuries are "attributed". The special schemes have imposed (or the operators of the schemes have undertaken) "liability" extending beyond the general law of torts so that the insurance is not liability insurance in the traditional sense – one of the differences being that the injured persons can make a direct claim against the insurance company. As the insurance schemes cover – or provide – the extended "liability", it would not be particularly meaningful to allow recourse against those who finance the scheme. The alternative compensation systems do not, therefore, provide such recourse, except that in Finland the industrial injuries insurance scheme allows for recourse against the employer.

As is the case for motor vehicle insurance schemes, a certain right of recourse may, however, be considered where an injury is caused by *particularly gross negligence.* In such cases it will normally not be the business as such (and thereby the "contributor") that has been negligent, but rather *employees* of the business (e.g. a doctor at the hospital where the injury was sustained). In this context, it should be considered that in the Nordic countries the general law of torts contains rules that

modify the personal liability of employees (in due consideration of the degree of fault etc.). Thus, it is not very remarkable that a possible right of recourse from the alternative compensation systems, mainly patient insurance schemes, is limited to cases involving intent or gross negligence (in Denmark intent only). Such recourse seems to have no practical significance.

Where *the public authorities* pay compensation, even where the injuries are not caused by public activities, the authorities naturally have recourse against the tortfeasor. Thus, the state has recourse against the perpetrator for all types of compensation paid to victims of crimes of violence. In Denmark, where compensation for pharmaceutical injuries is also paid by the state, it naturally has recourse pursuant to product liability law.

Apart from this, the recourse issue is particularly relevant where the scope of cover of an alternative compensation scheme *overlaps areas where the right to compensation is otherwise extended*. *Work-related traffic accidents* is a major example of such overlapping, which is, of course, particularly pronounced where the industrial injuries insurance concerned generally covers accidents occurring between the home and the workplace (as is the case in Sweden and Finland). Considerations about the most appropriate allocation of the costs of these accidents lead to the natural conclusion that they should be charged to the motor insurance scheme as the more "specialized" scheme, which can be done by recourse (as in Finland). Against this background it is somewhat surprising that the Swedish industrial insurance scheme does not provide recourse, especially considering that the occupational safety insurance excludes cover for accidents covered by the motor insurance if the accident is work-related only in the sense that it happens during transportation between home and workplace.

Another example of overlapping (of far less importance) is the *cover granted under patient insurance schemes for injuries caused by failing equipment*. For these types of accidents, all the Nordic countries retain a right of recourse that may, if occasion should arise, be exercised against a manufacturer where failing equipment gives rise to liability under product liability law. The question whether the systems are consistent may also be raised in this context, as the Danish and Swedish industrial insurance schemes do not provide a similar right of recourse for industrial injuries caused by a defective product – which undoubtedly is more frequently the case than in the area of patient injuries.

The various compensation schemes are bound to overlap, but it should presumably be attempted to limit the extent to which losses are subsequently transferred by means of recourse, and, where the right of recourse is retained, to make the rules governing recourse more consistent.

12 Operators of the Compensation Schemes

An essential and characteristic feature of the Nordic model is that the administration of the alternative compensation systems is generally handled by public authorities or special boards set up for this purpose, which therefore possess special expertise in the area. When a claim is filed, the authority/board must of its own accord investigate the case and on that basis determine whether the claimant is entitled to

compensation and, if so, what compensation is to be awarded. Special complaints bodies have moreover been established in most areas and either have the power to decide complaints, or authority to make recommendations that are invariably followed in practice.

The main objectives of this claims handling system are: (i) to allow injured persons a less cumbersome procedure; (ii) to reduce the claims handling time (especially compared to the delays involved in a lawsuit); (iii) to reduce the compensation system's costs of administration (e.g. because legal assistance is not normally needed) and; (iv) and to supply the system with special expertise. Without any doubt a more efficient claims processing has been achieved in this way.

Nevertheless, it would seem relevant to consider whether this system provides sufficient *due process* protection of injured persons. Once cases have been decided under this claims settlement system, however, claimants are usually allowed to appeal the decision to the courts, which may review them in full. The Finnish and Swedish voluntary schemes are exceptions to this rule, as appeals against them lie to an *arbitral tribunal* instead. Another exception is the Swedish compensation scheme for victims of crimes, under which no reviews by the court are allowed. Of course, injured persons may avoid the special claims adjustment scheme by opting to invoke the general law of torts; see above under subsections 7 + 8.

The access to have decisions reviewed by a court of law poses a certain dilemma for the alternative compensation systems. In theory, one cannot very well argue that injured persons should not be entitled to have decisions reviewed. Even if the operators of the compensation schemes act independently of the parties to the underlying insurance contract, experience shows that claimants do not always fully believe this to be the case. In practice it is obvious, however, that if claimants are increasingly inclined to exercise their right to appeal decisions to the courts, then the improved efficiency intended has not been achieved. On the contrary, court proceedings would then become the *superstructure* of the special claims settlement system, in which case both the overall delay and the costs incurred would be far greater than before.

However, in any case it must be taken into consideration that simplifying the claims reporting and claims handling procedures has undoubtedly had the side-effect that the alternative compensation systems generate claims that would never have been raised under the general law of torts, even in the event of tort liability.

13 Financing the Compensation Schemes

The alternative compensation systems, other than state-regulated ones, are generally financed by *insurance premiums* that are calculated in accordance with general principles of insurance. Actually, there is no difference in principle between such financing and the way the general tort law system is financed, as compensation for personal injury is in practice almost invariably paid by means of liability insurance. As is the case for this type of insurance (and other types, for that matter) the insurance companies, in calculating premiums, are free to carry out whatever degree of risk differentiation they consider worth-while. If such differentiation is deemed valuable, then that value has in principle been retained.

The single *exception* to this rule is the Swedish industrial injuries schemes (both the basic insurance and the occupational safety insurance schemes) and, in part, the pharmaceutical injuries scheme. The patient insurance schemes have the special characteristic that the majority of injuries occur in hospitals, which, in the Nordic countries, are mainly operated by the public authorities. Although financing is based on insurance in this field, too, it is evident that the costs incurred are passed on to the public at large by general taxation (as are the costs of the liability insurance that hospital owners would otherwise have to take out). Against this background it is no wonder that, in practice, premiums are determined in a stereotyped manner, typically based on the number of inhabitants in the region concerned.

One objection that could be made against the Nordic model is that it has *focussed on improving the position of injured persons* to such an extent that other aspects that could be dealt with by a compensation system have been toned down or ignored, including *prevention* in particular. The following arguments can be raised against that objection:

Firstly, as mentioned the alternative compensation systems are *not, in principle, financed differently* than the damages payable under the general law of torts. The exclusion of "personal" liability, other than limited liability (including recourse) in certain instances of gross negligence, see above under subsections 10 + 11, is a variation of more theoretical than practical importance.

Secondly, the alternative compensation systems originate from the recognition *that the general law of torts was of very limited importance,* especially in relation to medical treatment claims. The reason for this could either be that substantive law only very rarely warranted damages (especially for pharmaceutical injuries under product liability law) or because it was actually invoked only in a limited number of cases (especially as regards medical treatment injuries). It seems rather far-fetched that a compensation system of such limited importance could handle any function at all, let alone a preventive one.

Thirdly (and in continuation of the second argument), the alternative compensation systems *expand* the range of potentially allowable claims and accordingly cover *more injuries* in one particular area than does the traditional tort liability system, even when functioning at its best. In so far, the alternative compensation systems lead to a higher degree of "internalization" of the costs of such accidents than does the general law of torts.

Fourthly (and in continuation of the third argument), the alternative compensation systems optimize *knowledge of injury mechanisms and causes of injuries* in the area concerned, and naturally the more so where just one body handles everything from the notification of claims onwards. At its best, the general law of torts generates some knowledge of faults that may cause injuries, but that knowledge is not compiled and stored anywhere. However, it is far more important to prevent *injury* than (simply) to prevent *fault*. Thus, the alternative compensation systems can provide a *basis* for more extensive and effective preventive efforts than the general law of torts, but naturally they cannot guarantee that use is made of this opportunity.

Environmental Damage in Particular

As mentioned under section I, D, there is no Nordic "model" for alternative compensation systems in the area of environmental damage. Only very few alternative systems exist (and none in Norway) and the systems in operation have different objectives. Besides, their practical importance is limited.

Only the Finnish and Swedish environmental damage insurance schemes are interrelated (and in Sweden now supplemented with a so-called restoration insurance scheme). Their goals are to render the *existing strict liability rules more effective*, especially in cases where the party liable is unable to pay or where it is impossible to identify the party liable. The Swedish system also comprises cases where liability has become statute-barred. Thus, these schemes are in part analogous to those applicable in the motor insurance field in most countries (as regards injuries caused by unknown motor vehicles etc.) but to date they have proved to have little practical significance.

The special *Danish soil contamination* scheme has another aim that is directly related to the question raised in the introduction to the questionnaire as to whether a landowner is liable to the public authorities for the cost of cleaning up contamination on his land etc. This problem should be viewed in the light of the fact (i) that the rules governing strict liability for environmental damage are more limited in Denmark than in the other Nordic countries, and (ii) that special problems arise when the general law of torts is applied to these cases. The greatest difficulty is that the public authorities can hardly be regarded as "the injured party" in cases where the contamination poses no threat to public interests. In principle, this does not preclude the *possibility* of viewing the problem as a tort law issue, especially as, in this area, the public authorities will often have to apply tort law standards exclusively (especially fault-based assessments of contamination caused by non-business activities; see the comments under subsection 6 above). In addition, no steps have been taken under the Danish scheme, other than for contamination caused by oil tanks, to ensure that landowners fulfill their liability towards the public authorities.

Final Observations

Although one might not be willing to go so far as to speak of a special Nordic "model" for alternative compensation systems, it is incontestable that the various schemes have many common features, and that they all emerge from the common understanding that the traditional law of torts is an inadequate and, in several aspects, inappropriate instrument for regulating these areas, especially in the area of personal injuries. Whether or not they are termed a "model", they nevertheless originate from a model, and although developments in this field have been characterized by pragmatic, "tailor-made" solutions to specific problems in the individual areas of injury, their common features are more dominant than their dissimilarities, both from scheme to scheme and from country to country. This is

most evident for the "new" compensation systems (the patient and pharmaceutical injuries insurance schemes), maybe because they are also distinguished by their clear objectives. Less pronounced are the similarities in the area where an "old" compensation scheme provided a *certain* alternative (the industrial injuries insurances); none of the Nordic countries has succeeded in establishing a single, more complete alternative in this area. The pragmatism of this development has its price in that there is a certain inconsistency in the way specific problems have been solved, but this study has revealed that the inconsistencies concern the details of the compensation systems rather than their fundamental features. Some dissimilarities are, moreover, attributable to different traditions in the various countries.

The main objective of all these systems seems to be to improve the *compensatory function* of the general law of torts. It could be argued that such an objective is one-sided. The general law of torts performs, and should perform, several functions. However, the alternative compensation systems are also founded on scepticism as to the value of the law of torts in that respect, especially its preventive function. Its value in that respect is, at best, uncertain, and preventive objectives can be pursued in many other ways (including ways that could be aided by the alternative compensation systems). It is, therefore, obvious to try to develop and improve the compensatory function and at the same time uphold the view that the parties "responsible" for the accidents should finance the compensation. What this leaves is that such "liability" is no longer *determined* in fault-based actions for damages before the ordinary courts of law. The symbolic value of this should not be underestimated, and is probably one of the reasons why it has proved difficult to abandon this system in the area of industrial injuries. However, those who attach great importance to this value thereby take a view of the general law of torts that is at least as one-sided as those who advocate the alternative compensation mechanisms.