Recent Developments in the Danish Law of Tort

Bernhard Gomard

1 The Law of Tort is Only to a Limited Extent Statutory Law

The law of tort is often a topic of public concern not only in the sense whether damages can be claimed according to the law in force but also in the sense what the law ought to be. The actual law of tort is only to a limited extent statutory law and thus mainly based upon case law. Outside the area of statutory law, it is for the courts to decide whether the rules of liability shall remain in force or adapted to be up to date. However, it is not obvious what is required nowadays concerning rules of liability. And it is certainly not obvious that the claim for new rules should be met by the judiciary, that is to say by officials with a legal education and professional experience from handling various legal questions but without any authorization from the electorate. It is therefore of some interest to find and describe the grounds that are suitable to be taken into consideration in order to make up one's mind whether the existing case law should be maintained or changed.

It cannot be expected that the courts will change the rules within the compass of legislation. Each year the amount of damages for personal injuries is carefully adjusted by statutory law to keep in tune with the index of prices and wages. A bill (L 143 of 2000.01), following the report (Betänkning om Revision af Erstatningsansvarsloven m.v. No. 1383/2000, p. 96), shows that Government is in favour of the increase of the amount of damages for personal injuries by an amendment of Erstatningsansvarsloven (EAL, Liabilities in damages Act). Government also accepts that the proposed increase of these damages to over 50% will require an increase in liability insurance premium for cars to about 15 or 20% and for commercial liability to about 5-10%. The bill is expected to be adopted. Within this area nothing is entrusted to the judiciary. However, it is perhaps possible to understand the legislative acceptance of the rise of premiums to finance the increase in damages for personal injuries as an indication that is important within other areas of the law of tort.

Public liability insurance is very widespread and some liability insurance is statutory based. Most people are covered by private liability insurance, and also commercial liability insurance is common. Most of the claims for damages that are met are paid by liability insurance. An increase of the liability in one area or another assists a group of injured, and these increases will normally only involve a slight increase in the premium. The common budget of premium for a normal family is about 5.000 to 10.000 Danish Kroner per year. An increase with 1% now and then is without substantial importance and further not perceptible due to the common and necessary index adjustment of insurance amount and premium.

The statute concerning the state's liability to pay damages to victims of crime can be seen as evidence of the intention of the legislator that claims concerning personal injuries are paid in real life. Liability insurance does not cover criminal liability and besides insurance is not common among criminals. The statute mentioned enables the victims to claim damages from the state gauged by the Liabilities in damages Act (EAL).[1]

Recent legislation has made the liability for negligence more stringent. Patients in a medical hospital, receiving a treatment inferior to what an expert could have performed and consequently have suffered in health can make a claim for damages not against the physician but against the owners of the hospital, that is to say the county.[2] Several statutes have imposed strict liability for damages due to specific activities, or damages of a specific character, e.g. damages to the environment based upon Miljöerstatningsloven (The Environmental Protection Act) and Jordforureringsloven (The Soil Protection Act) .[3]

Statutes concerning torts in relation to particular areas are binding with respect to these areas but are these statutes also important beyond the scope of their application? Legal proceedings have been taken and will presumably continue to take place concerning fundamental questions of liability and damages. It is interesting to consider whether the pronounced stance of the legislator to provide the best possible compensation for the greatest possible number of people has made – or ought to make – an impact upon the decisions made by the judges in cases concerning torts in relation to questions of the scope and stringency of the rule of liability and questions concerning the scope of strict liability. The social security legislation assists the injured in cases of unemployment, industrial injuries and illness, but it does not assist persons as consumers, as engaged in private business or as owners, who suffer harm caused by others, be it personal injuries or damages to property. In our wealthy society, in which we endeavour to establish a society of welfare in terms of the

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1 See the commentary to this statute by Jens Möller, 5. ed., and v. Eyben & Vagner, *Erstatningsret*, 4. ed., p. 268 and concerning the extent of the damages Betänkning nr. 1383/2000 p. 33f and p. 96f and Bill L 143 in 2000-01.

2 See on Patientforsikringsloven v. Eyben & Vagner, p. 258ff, in particular notes 46-49 on particular statutes and the motion concerning the extension of the scope of the statute and the extent of damages, Betänkning No. 138/2000 p. 34f and p. 96f.

3 See on these statutes for example Sören Theilgaard, *Miljöansvar* and Peter Pagh, *Miljöansvar*.

equalization of incomes and solidarity among the citizens, it is taken for granted that injuries are compensated as far as possible by means of social legislation and the law of tort and insurance. As mentioned in sec. 4.3. the judicial comment in UfR 2000B.403 emphasizes the importance as a legal source for the development of the case law of the fundamental principles of equality and the prohibition against discrimination. So far, case law has hesitated to develop a general attitude towards equal treatment that places the few unfortunate that are injured on a par with the majority of the fortunate that are not. To establish this equality of treatment is not within the scope of judge-made law. We are still far from a comprehensive scheme of compensation without regard to the causes of damages even though the question whether the mind of the tort feasor is guilty or not is only of slight importance for the injured, and without regard to the fact that the number of accidents without negligence in most areas is insignificant.

The classical doctrine of legal sources should perhaps be reconsidered. The reform concerning the appointment of judges, that has been put into effect by an Act of 1998, endeavours to introduce "a broader recruitment to the justiceship" in order to give the judges "a good and comprehensive grounding in experience".[4] This raises the question whether the broader recruitment only shall be applied in order for judges to get a deeper appreciation of the facts in the future cases because of their knowledge of accountancy, taxation, commercial business etc. Or whether the recruitment in addition shall give the new judges the opportunity to develop or change the law. This is a fundamental question that is neither fully considered nor clearly answered.[5] Considering the Act of 1998, it is not clear if the reform is only to be seen as a general increase in good workmanship, a more just distribution of good appointments among qualified lawyers, or if it can be seen also as a way to introduce a substantial change in terms of greater openness for new ideas or conversely, what seems more unlikely, a greater respect for precedents. Special knowledge in new areas, be it the protection of consumers, industrial work or whatever, is often based upon general attitudes. You acquire knowledge within the areas you care for. A typical modern tendency is that the belief in authorities is waning. It is possible that this tendency also will be manifested in relation to the application of the law, in any case in the sense that it makes it easier to reconsider older precedents.

4 The rules in force are found in Retsplejelovens kapitel 4, as drafted by Act No. 402 of 26. June 1998 (The Administration of Justice Act). The amendment has been prepared by Domstolsudvalgets betänkning No. 1319/1996 and FT 1997/98, 2. Samling, tilläg A sp. 886.

5 Compare Betänkning 1319/1996 p. 175 and Bernhard Gomard in Höjesteret 1661/1986, (special issue of UfR p. 45f). Pontoppidan, *Dommeren i det 20. Århundrede*, p. 351 and articles in J. 2001.42-74.

2 The Extension of the Scope of Application of the General Rule of Liability

2.1 Universal Validity

The rule of liability for fault is often said to be a general rule, that is to say a rule of universal validity. However, the scope of this rule of liability has been thought to be restricted to the infliction of corporeal harm caused by corporeal means. This is stressed, with varying degrees of emphasis, also in modern Nordic literature concerning tort and can be traced to Roman Law of the lex Aquilia: damnum corpori corpore datum.[6] The fundamental element in the classical rule of liability (the fault or culpa rule) is the comparison between the cause of the damage and the normal conduct and attitude of a reasonable man (bonus pater familias). The culpa rule however has in modern times developed into a general rule of liability that covers all and everything in relation not only to personal injuries and property damages but also pure economic damage caused by complicated causal relations without any regard to personal injury and property damage. A comparison between the behaviour of an ordinary and prudent person and desirable behaviour within these new areas will seldom lead to a result. An adjustment – in effect a change – of the rule of liability is necessary in terms of a common, far-reaching and flexible rule in order to cover pure economic damage caused in various ways. It is obvious that the rule of general professional liability covers pure economic damage. The professional liability of lawyers and auditors consists almost exclusively in liability for pure economic damage. Their liability insurance does not even cover personal injuries or damage to property. [7]

It is difficult to apply the rule of liability, having developed from the culpa rule into a universal rule of liability, since the general wording - fault - of a universal rule with an extensive scope only offers restricted guidance and control. There is room for a creative judicial practice. As an example there is the decision in UfR 1997.364H (Satair). In this case the rule in § 142 of Aktieselskabsloven (Companies Act), prescribing liability for the shareholders in terms of gross negligence, was disregarded in favour of the application of the general rule of liability with respect to the seller of shares sold for a considerable higher price than their intrinsic value to a buyer who stripped the company for assets without paying its debt of taxes. There is also a clear tendency in other areas to hold that undesirable or untoward conduct is unjustifiable and therefore results in liability. An example is the decision of Sö-og Handelsretten (the Maritime and Commercial Court), concerning an unusual prospectus for new shares (the Hafnia case, the decision has been appealed), see also UfR2000.2176H on commercial leasing and 2000.920SH.

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6 V. Eyben, *Erstatningsret*, 4. Udg., p. 8f, Lödrup, *Erstatningsret*, 4. Udg., p. 52f, and Hellner, *Skadeståndsrätt*, 5. Uppl., p. 49ff. Gomard, *Erstatningsregler*, p. 182ff considers the rule of negligence as a common rule with a flexible content. On Roman Law, Tamm, *Roman Law*, p. 161ff.

7 The responsibility for damage to persons and things must be covered by a general occupational liability insurance, see Hasselager m.fl. *Revisorlovgivningen*, 2. ed. p. 49.

Advice is distinct from services consisting in the execution of the very task, e.g. the selling of shares or transfer of money, about which advice is sought. Advice leaves the decision what ought to be done and its execution to the person seeking advice. This does not rule out that there may be liability for omitted or bad advice. Adverse investments, carried out through banks or financial institutions, raise the question whether these institutions ought to offer financial products without considering their merits and without advising (guiding) of customers who are not experienced professionals. In general, there is no duty in relation to customers who do not ask for advice, and the institution can probably avoid liability by an explicit statement that it does not wish or is not in a position to offer any advice.[8] These questions have been considered by the courts in UfR 1993.696H imposing liability upon a bank in relation to customers having signed to participate as limited partners in a hotel since the information offered was not reliable. In UfR 2000.577H the court gave judgement in favour of the bank based upon "a total weighing of the behaviour of the investors and the bank". In this case the bank had granted the investors a loan to participate in a dubious investment project offered by a "group of brokers" without stating that the bank had not made any evaluation of the project.

There is liability according to the rule of liability for advice about social benefits and the like that is presented by people having a professional role within institutions or organizations if the advice is inappropriate due to lack of knowledge or misunderstanding of the complexity of the rules, see for example the case of UfR 1991.903H concerning a trade union. The liability is not limited to employees who are mainly concerned with the administration of the rules that are important for the advice.

2.2 The Criterion Involved in the Universal Rule of Liability

It is hardly possible to formulate the scope of the liability in clear and definite terms. The liability for people exercising particular professions has been called professional liability, but in reality it is liability according to the culpa rule.[9] The requirements for agents within a particular profession are determined by the comparison between the behaviour of the injurious agent with the behaviour of a skilled agent rather than the behaviour of a prudent man. In recent cases, for example UfR 1985.555H, technical experts have often used the term "professional error". Recent legislation has ordinarily chosen another terminology. Several new statutes, including statutes dealing with new areas, demand conduct in accordance with "good practice" within the relevant scope of the statutes. Thus lov om behandling af personoplysninger nr. 429 af 31 maj 2000 § 5 sec (statute on personal information) states that "information must be

8 See on banker's advice for example *Betänkning om Rådgiveransvaret* No. 1362/1998 p. 51 f and Lynge Andersen & Mögelvang-Hansen, *Finansiel Rådgivning*.

9 The term used in English law is professional negligence. For a long period it was held in England that there is only liability for professional negligence in relation to professional assistance to the client but not in relation to other people, see for example J. P. Eddy, *Professional Negligence*, but consult Winfield & Jolowicz *on Tort*, 15th ed, p. 376ff.

treated in accordance with good practice for data processing". No "practice" can have developed, but the reference to good professional practice as a universal norm seems to presuppose that there is as a matter of fact a general and approved professional practice. The situation is rather that the legislative intention is that such a practice should be developed. The term "good practice" is an elastic term that presents several possibilities for a development by the courts or, in instances of the Act containing special authorization, regulation by delegation. It is not always indisputable what is or ought to be accepted as technical good and proper practice according to the opinions held by an elite or a majority within a branch of trade. In UfR 1997.824H concerning advice about taxation it is suggested that it is not a matter of course that auditors are liable for advice concerning taxation of commercial transactions that are not motivated as normal business but rather by tax evasion. Later judgements concerning advice about taxation seem to impose a professional liability grounded in general and approved practice, see UfR 1999.574H, 2000.521H and 2000.1322H and in addition Betänkning om rådgiveransvar nr. 1362/1998 p. 77 and p. 81. Good – existent or desirable – practice has been applied as a norm in modern case law concerning liability along with the application of the classical rule of the reasonable man (bonus pater familias) in every day life of torts. The sanctions for violation of the culpa rule are both damages and prohibitions. The relation between the claim demanding observation of the good practice and the sanctions in terms of liability according to the culpa rule and prohibitions has been stated in several but not all of the statutes which require the observance of good practice. Thus the Marketing Practices Act § 1 (Markedsföringsloven) requires the observation good marketing practice, and § 13 states that "actions contravening the law can be prohibited and incur liability in accordance with the general rules of Danish law".[10] These rules have been applied in instances of plagiarism, see UfR 1994.671H. This case illustrates that the efficacy of a rule of liability within this area depends upon the attitude of judges to fix damages according to discretion in the absence of a conclusive proof of loss. In general it is more difficult to adduce evidence of pure economic loss than evidence for injuries or loss of property.

2.3 The Limits of the Rule of Liability

The application of the standard of the prudent or reasonable man (bonus pater) or the practice and knowledge of a good professional as a measure of wide scope of liability will not always lead to an acceptable result. Whether there is a case for liability must be based upon a more extensive evaluation that pays attention also to public opinion and signals from the legislator. This is illustrated by a recent and comprehensive Norwegian report, NOU 220:16, 661 pp. concerning

10 The clause in § 13 sec 2 was inserted by Act No 424 of 1. June 1994, but in the comments to the bill, FT 1993/94, part A, p. 7271, it is said that the clause "develops" an extensive practise. Other examples of the wording of rules based upon good practice are BSL § 1, sec. 6 and LFV § 7, which authorizes the Financial Supervisory Authority to impose instructions to companies.

the question if the tobacco industry is liable in relation to people harmed by smoking. The report concludes that the industry has behaved tortiously, p. 32 and p. 246f. The question whether the industry has behaved negligently or properly in accordance with the approved practice is however, so the report, of minor importance for the question of liability, because rules or principles of strict liability must entail that the industry is responsible, see the report p. 33 f. and p. 258f. Tobacco presents a particular risk. Tobacco is not a safe product, cf. the Danish Produktsikkerhedslov No. 364 of 18. May 1994 § 6 (the Safety of Products Act), and below sec. 5. The arguments that smoking is entirely voluntary and that the risk is well known by everybody and generally accepted do not meet the report's approval. A Norwegian decision in a court of first instance in favour of the tobacco industry has been appealed.

The Norwegian report is interesting as a plea for the extension of the ordinary rule of liability to include personal injuries caused by the use of products such as tobacco – and perhaps, according to circumstances, also the use of other articles for every day use, food and stimulants that can be freely bought everywhere and used or consumed by everyone. An extension of the rule of liability in this respect by new or changed case law does however present great difficulties. The report has not solved these difficulties, in any case not with respect to the situation in Denmark.

The difficulties are:

– Smoking is subject to limits imposed by legislation.[11] However, smoking is not prohibited in contrast to the prohibition of buying and possession of drugs according to Lovbekg. Nr. 391 of 21. July 1969.[12] A liability for damages would – in any case in practice – entail a prohibition. This liability would in turn make the existing statutory rules concerned with more lenient interventions against tobacco meaningless.

– The report does not address the question if liability is an appropriate mean to effect a real prohibition of a general known and used article like tobacco. The sentencing of national producers of tobacco would raise more questions. Is it the case that both production and selling, including import from and export to non-prohibitory countries, have to be banned? What is the importance of former warnings and the succeeding emphasis upon warnings? Should import and sale of tobacco be prohibited, as is the case with hash? Is a liability for dealers desirable?

– Some – surely many – people hold that in addition to harmful effects tobacco also has some good and valuable effects, like pleasure of taste, relaxation and relief, self-affirmation and etc.[13] The report does not consider the

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11 Lov nr. 436 af 14. Juni 1995 om rögfri miljöer i offentlige lokaler, transsportmidler og lign., Lov nr. 326 af 13. Juni 1990 om märkning af tobaksvarer og tjäreindhold i cigaretter m.v.. Lov nr 1086 af23 December 1992 and Bekg. nr. 1213 af 23. December 1992 om forbud mod visse snustobaksvarer. – The EU-court has in a decision of 5.10.2000, case C 376/98 and C 74/99 annulled a directive concerning advertisement of tobacco.

12 See also Straffeloven § 56 sec. 1 No. 3 and 4 (Criminal Code) stating conditions for a suspended sentence and listing the omission of abuse of alcohol in contrast to tobacco that is not mentioned.

13 See the PhD-dissertation by Doctor Charlotte Tullinius, "*Vi bliver ved med at ryge – hvorfor?*" considering the public attitude to tobacco.

weighing of these positive effects with the harmful effects. The fundamental question is concerned with the weighing of considerations for or against the introduction of rules of liability and prohibitions, and this should not be decided by the judiciary but left to the decision of Folketinget (Parliament). Restricting personal freedom is for the legislator to decide.

– In Denmark, the liability for tobacco is briefly considered in Betänkning om produktsikkerhed nr. 1256/1993, p. 23. The present Danish law is that "from the perspective of the belief in functional harm, there is no liability for lung cancer caused by smoking". In support of this position, the report refers Börge Dahl and others in J. 1990.156 and 161. There is neither liability for functional harm according to the culpa rule nor according to a rule of strict liability. It is a matter for discussion if the injurious effect of tobacco, resulting from a hitherto underestimated side effect, is a "functional harm". The term "functional harm" is an elastic term, but the risk for being harmed by smoking has been considered to be acceptable. The product is therefore not "defect" in a statutory sense, and marketing of the product is not unjustifiable. Despite the extensive public discussion in Denmark, nobody has tried to apply the general rule of liability, nor the law of the product liability act or used the law of Security of Products Act § 13 in relation to the use of tobacco, or of alcohol, mobile-phones and other things in ordinary use that now and then are critized as being harmful.

2.4 Ecomic Loss

The general conditions of liability in terms of economic loss and adequate causal connection must be fulfilled in order to impose liability for pure economic loss, see above sec 2.2 at the end concerning cases of imitation and plagiarism. In a recent report on advice, Betänkning om rådgiveransvar nr. 1362/1998, p. 159 and p. 131, a minority has suggested a change in the existing rule limiting liability to economic loss to cover also liability, according to circumstances, for disappointments to be introduced as in a new § 26a in the Liability of damages Act.

3 Tightening the Main Criterion – Culpa- in the General Rule of Liability

3.1 Flexibility – Manual Errors

Culpa (guilt or fault) in various formulas and good practice constitute the main criterion – or standard – in the general rule of liability, but they are flexible concepts. This flexibility has presented a possibility for the development in the law of tort in the direction to tighten the liability without changing the terminology and without need of statutory authorization. The changes that have been introduced are practically without exception changes toward a more rigorous treatment of liability. Liability for the state for *manual errors* committed by the staff has been endorsed in UfR 1996.1446H but limited to

conclusive proof of human errors. In this decision, and more are cited in the editorial note, singular instances of human errors have been judged leniently. This reluctance is a matter for surprise, considering the rule in EAL § 19, sec 2, no. 2 (the Liability of damages Act) imposing liability for negligence in relation to the execution of public work, even if the damages are covered by the injured's insurance. The rule in EAL § 20 states that the state, according to circumstances, is to be treated as self-insured, and the rule in § 23 states that employees are protected against personal liability for negligence.

3.2 Defects and Malfunctions of Things

In the public and private sector, liability for harm due to defects and malfunctions of things, both real defects, wrong design and wrong choice of components and materials has been judged harshly, see for example UfR 1989.1098H and 1995.550Ö concerning the liability of the owner of real property. The subjective element of negligence in the culpa rule practically disappears in these and other cases.

The liability for the person operating a thing and the liability for the owner and user of a thing cannot be founded upon *Produktansvarsloven* (the Responsibility for products Act). The scope of this act is movable property, including property incorporated in real property, § 3 sec. 1, and a similar rule is stated in Produktsikkerhedsloven § 3 (the law of product safety act) but Produktansvarsloven is only concerned with the liability of the producer and dealers.

4 The Extension and Definition of the Scope of Strict Liability

4.1 Special Legislation

Several statutes impose strict liability within particular areas. The legislator is apparently in favour of strict liability in relation to areas that can be surveyed so it is possible to evaluate the consequences. The extensive modern legislation concerning regulation of activities within broad areas has probably curbed the development of an independent and creative case law in terms of strict liability.

In UfR 1996.1446H in a case against a public authority, mentioned above in sec. 3.1, the Supreme Court clearly rejected a broad objective liability despite the fact that harm due to accidents in relation to flying in order to pass the test of flight certificate is "foreseeable" and that the costs to the Airport Authorities in virtue of an objective liability could be quantified by an occupational liability insurance and included as a (modest) item in the budget.

4.2 Case Law on the Relations Between Neighbours and the Like

A movement towards rules of strict liability in the case law in certain areas can be witnessed. The rule of strict liability holds for the relations between

neighbours and related cases of adjoining properties, see already UfR 1968.84H (Ålborg Monastery), later UfR 1983.714H, 1983.866H and 1983.895H and after an interval again UfR 2000.1779H concerning the bursting of a sewer. The argument of the last-mentioned four cases is that the person who starts a plant and is engaged in its running when established is liable for damages caused by the implementation of the plant and its working if it had been possible to evaluate the risk of causing harm at the time of the planning of the plant.[14] These decisions emphasize that the behaviour of the entrepreneur has not been negligent. The justification corresponds pretty close to the argument advanced by Henry Ussing that the courts should adopt a general principle of strict liability for hazardous activities that create special risks. According to Ussing, the principle of strict liability can be seen as a price to be paid by certain enterprises for engaging in hazardous activities in a lawful manner.[15] Ussing held that his proposal concerning liability for hazardous activities was accepted by the legislature by the act No. 117 of 11. March 1921 concerning liability for harm caused by railways. This act has been repealed and replaced with Lov om jernbanevirksomhed m.v. No. 289 af 18. Maj 1998 Ch. 7 (the Railway Act) that imposes rules of strict liability and rules of compulsory liability insurance. In contrast to the repealed statute, the rules of the new statute comprise (almost) all operations of railways.

The term "foreseeable" is ambiguous: certain, definite harms, certain types of harms or an abstract risk of harm can be known, foreseeable, probable or to a greater or lesser extent likely to occur. Any exercise of economic activity involves risks. Actuaries are professionally engaged in the evaluation of risks and the risk for private or public enterprises can be quantified by the taking out public liability insurance or All Risks insurance. The costs can be included as a definite item in the budget to cover liability, be it liability according to the culpa rule or a rule of stricter liability.[16] The argument of the four decisions would have been capable of covering the development toward a general rule of strict liability for harm caused by hazardous contrivances or hazardous enterprises, but a tendency to do so was quickly halted, see UfR 1984.450H and UfR 1987.258H. In contrast, the liability within the area of the 1983 decisions – the area of relations between neighbours – has been maintained in the decision of UfR 2000.1779H concerning the bursting of a sewer, mentioned above.

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14 A distinction can hardly be drawn between foreseeable and generally known operational risk, except from damages having the nature of "development damages ". It is said that he strict liability for harm caused by asbestos imposed by the decision in UfR 1989.1108H is grounded in "a combination of aspects of operational risk and aspects of foreseeability", see the comment to the judgement in UfR 1990.241B. The decision is also considered by Peter Pagh, *Miljöansvar* p. 303f.

15 Ussing, *Skyld og Skade* pp. 60f, 84, and 124.

16 Compare the duty for the builder to insure during the period of building AB 92 (general conditions for construction) § 8.

4.3 The Principle of Equality as Ground of Liability

Another modest extension of the strict liability in relation to the area of neighbours or adjoining properties has been implemented in case law concerning liability for nuisance, in particular from public enterprises in connection to expropriation, but independently of the protection of property according to Grundloven § 73 (The Constitution), in the decisions of UfR 1976.86H, 1999.353H and 1999.360H, see the judicial comment in UfR 2000B.403, on noise from motorway and also UfR 1997.105H and 1998.1515H, see the judicial comment in UfR 2000B.412 concerning the risk of harm from the new wiring for a high-voltage plant. In the modern welfare society the desire to assist individual and unfortunate citizens, who are exposed to particular risks or nuisances, e.g. those living in the vicinity of a leaking or noisy enterprise or a power plant, is a matter of considerable moment. The desire to assist those who are hit by an "incidental" harm does not seem to require any further justification since it can be supported by a general principle of equality or the disapproval of differential treatment (discrimination). The desire and the principle indicate an extension of the assistance provided by the law of tort to the few unfortunate victims that are harmed or injured by accidents that cannot be classified as social events such as illness or industrial accidents according to the public law of social welfare. In the instances mentioned, the desire can be met by the extension of the scope of the rules of liability to cover claims against those that build or run a public enterprise. In Norway, a principle of social equality has been considered as able to form the basis for the equal treatment of owners harmed by noise from a motorway who owned and owners who did not own land taken over by compulsory purchase for the construction of the road. It is claimed that this principle has been accepted by the decision in UfR 1999.353 (367) H, in the judicial comment to the decision in UfR 2000B.403.

Natural catastrophes are accidental losses. In general, catastrophes are not covered by insurance[17] but Lov om stormflod og stormfald No. 349 af 17. Maj 2000 (the flood and windfalls Act) has imposed solidarity upon (almost) everyone with the unfortunate victims that are hit by catastrophes in terms of a statutory scheme of insurance.

4.4 Independent Contractor

Another extension of the liability for harm that is not caused by any negligent behaviour of the entrepreneur but is liability based upon a foreseeable risk, akin to the liability imposed in the relations between neighbours, that is to say the risk of errors committed by sub-contractors and entrepreneurs employed by the principal head of the business. The sub-contractor and entrepreneur are liable for their own negligent behaviour. The principal is not liable as an employer according to the rules on vicarious liability in 3-19-2 of the Danish Code from 1683 for independent entrepreneurs, but nevertheless liability was imposed in UfR 1999.1821H. In this case an independent entrepreneur had laid underground

17 J. Jacobsen m.fl., *Entrepriseforsikring* p. 116f.

cables for Teledanmark and placed the cables in such a way that they had "sown" a conduit off, yet not until the lapse of 13 years.[18] It was held that the entrepreneur has acted negligently and was liable to the party for the repair of the conduit and the damage caused by the outflowing water. Teledanmark had not acted negligently but had "as the owner of the cable … the technical and financial possibilities to limit and regulate the risk in relation to the proper execution of the work". Therefore Teledanmark was also liable, but had the right of recourse against the entrepreneur. The decision of UfR 1999.821H has extended the doctrine of liability for "independent contractor" considerably.[19]

4.5 A Universal Rule of Liability for Insurable Operational Risks?

In every case mentioned above in sec. 4 entries 2 to 4, it is possible for companies and enterprises, particularly but not only enterprises of public utilities to include within their budget not only "foreseeable" costs of construction and maintenance but also the cost incurred by the insurance of the liability for damages to be paid in cases of accidents and nuisances due to the foreseeable risks to neighbours and adjoining properties. If so, companies and enterprises have been found liable in the decisions mentioned above. Liability cannot be imposed upon a company according to the culpa rule, only because experience and statistics indicate that accidents happen, or harm is caused by the victims own fault or by negligent behaviour of other people. It is not wrong to engage in building and maintaining a business. Wrongful activity from a company that does not have the nature of acts that can be prohibited according to Retsplejelovens § 641 (the law of administration of justice Act) concerning an activity that contravenes the claimant's right. Injunction against the construction of pipelines or highways etc. is not an appropriate means to protect or assist people or things exposed to risks from such installations that are foreseeable but not a wrong as such. Decisions concerning the construction of necessary – or after all resolved – roads, railways, and airports or about other large enterprises cannot be regulated by the rules of liability or by injunctions according to Retsplejelovens § 641. Former ideas concerning the justification of strict liability based upon the desire to adjust the competing interests between the entrepreneur and those exposed to the operational risks or the justification of liability as "an automatic regulator of production" (Ussing, Erstatningsret, p. 118f) carry no weight to-day. The extent of damages in question does not add up to any considerable amount and has no relevance for the planning and running of larger installations. Information about risks can easily be obtained from insurance companies or from the experience with the course of harms in corresponding enterprises, but lawyers are rarely mathematical beings. Arguments are often

18 The liability towards the injured was not limited in virtue of the rule of suspension in § 3 in Foräldesloven of 1908 (the law of limitations act). The liability of the builder, but not the liability of recourse, would have been barred according to AB 92 § 36.

19 See Gomard, *Obligationsret*, 2 de, 2. ed., p. 163. The decision must lead to that the builder insures, the builder's right of recourse is covered by the builder's general enterprise insurance, see J. Jacobsen m.fl. Entrepriseforsikring, p. 97f.

based upon verbal common sense reasoning. It would, for example, be interesting to investigate whether the profit by large-scale pig farming can cover the costs of paying damages for the possible economic loss caused by offensive smell to the surrounding owners.[20]

It is difficult to estimate the consequences of a general rule of liability for foreseeable operational risks, and adopting a such rule in the case law would imply a substantial change in the law of tort. According to Danish tradition it is going too far for the judiciary to lay down a strikingly new general rule of law.

5 Objective Product Liability According to Lov om produktansvar No. 371 of 7. June 1989 (the Products Liability Act)

The key concepts in Produktansvarsloven (the Products Liability Act) and in Lov om produktsikkerhed Nr. 364 of 18. May 1994 (the Safety of Products Act) are defect products and producers. The two statutes use similar concepts and are based upon two Directives adopted within the EU programme on consumer protection, now is dealt with in Art 153 in the Treaty on the European Union. Produktsikkerhedsloven was prepared by Betänkning om produktsikkerhed nr. 1256/1993 (report on product safety). Produktansvarsloven only covers personal injuries caused by defect products. The statute has only independent importance in relation to accidental damage. A defect in goods will often fall upon the person using or consuming the defect product. Liability according to Produktansvarsloven is not confined liability for harm caused by use of the product in private life.

In Produktansvarsloven, there was originally an exception from the rule of objective liability in relation to raw agricultural products and etc. This exception was removed from the Directive of product liability by a Directive of 10. Maj 1999 (1999/34/EF), and as a consequence also the rule in the Danish act was repealed by Lov No. 1041 of 28. November 2000. The commission has considered the possibility of a more extensive scrutiny of the Directive of product liability and published an instructive paper (COM (1999) 396). The Commision has suggested that the rules concerning withdrawal of dangerous products in the Directive of product safety (the Danish act § 12) be tightened by an amendment proposal of 29.3.2000 (COM 2000.139 OJ no. C 337 of 28.11.2000 p. 109-121).

Personal injuries caused by defective products happen – fortunately – only on rare occasions. Property damage caused by defective products occur more frequently. Several cases claiming damage for defect products have been brought before the courts and many more have been settled by negotiation with

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20 Ussing and several others would restrict the objective liability to particular (exceptional) activities or enterprises. This has happened by Miljöerstatningsloven nr. 225 of 6. April 1994 (the law of environmental liability act). In § 1, an objective liability is imposed upon industrial business, thus for example an objective liability is imposed upon agricultural farms with a total storage capacity of 375 cubic metres or more for liquid animal fertilizer with respect to air pollution, but it seems that this concept does not include offensive smell, compare Sören Theilgaard, *Miljöansvar* pp. 45, 77, 80f and Peter Pagh, *Miljöansvar*, p. 145.

the producer's and/or the dealer's insurance company. The liability for property damage caused by defect products is not based upon statutes. The liability is not mentioned in Produktansvarsloven, and the statute makes no room for analogical arguments or arguments e contrario. In § 13 in the Act it is laid down that the act does not "limit" the application of other rules of liability. Case law has imposed a liability for defect products in terms of an objective liability and thus a liability for personal injuries identical or close to the Produktansvarslov. In the case UfR 1999.255H with note 1 a producer was held liable for a defect product because the product's defect could have been found "by a *different or more comprehensive quality control*". This is a concise and general statement. Defects that cannot be found by any conceivable quality control are very rare. A certificate of the business according to ISO-standards could hardly suffice to relieve its liability.[21] What is left, if the statement of the court is followed, is - only or nearly only – the objective liability for personal injuries, just as the liability according to Produktansvarsloven § 7, sec. 1, nr. 4 for personal injuries, yet not extended to cover "development harms", i.e. risk not yet known to experts in the field, cf. UfR 1994.512H on building materials. The difference between the liability for personal injuries and liability for defect products is accordingly scanty, if at all existing. Attention must be paid to the fact that a "development harm" can trigger a contractual liability in relation to the buyer, and the defect can according to circumstances give rise to contractual claims of the revoking of the contract or a pro rate reduction of the price. The existence of such a defect makes it possible for a buyer to pursue an action against the seller, see UfR 1987.434H, but not against an entrepreneur, see UfR 1994.612H.

Several questions concerning liability for defect products have been decided by the courts according to the same rules of liability that apply for personal injuries.

– A business man acting as "middleman" or dealer is liable to the buyer for the producer's liability according to Produktansvarslovens §§ 10 and 4, sec. 3, see UfR 1999.255H. The creditor's risks concerning the claim against the producer - solvency, procedural risks - are thus firmly placed with the middleman.

– The producer's liability and thus the middleman's liability is a liability in tort and thus not in general affected by the contractual terms of delivery, see UfR 1999.255H with notes 2 to 4.

– Harms to customers suffered in Denmark are subject to Danish law and Danish jurisdiction.

Harm caused by older products due to lack of maintenance is not within the scope of product liability. Product liability for older products can be difficult to carry through. Proof is required that the defect causing the harm was present when the product was put on the market, see Produktansvarsloven § 7 sec. 2, but poor keeping qualities can be a defect. Owners and users of things do not incur an objective liability for the use of the thing whether the harm is caused by an original defect or by a later incurred defect, at any rate not under the rules of product liability. Harm caused both by original and later defects can be covered by the liability of the owner or user to control and maintain his things. This type

21 See on quality certificates, P. Neergaard, *Kvalititetsstyring*, p. 169f.

of liability is strictly enforced in relation to owners of buildings, see UfR 1995.550Ö and also, but more leniently towards Highway authorities, see UfR 1996.43H and above no. 3.

6 The Rules in EAL Concerning the Distribution of Liability Between Several Tortfeasors

Several tortfeasors liable for the same harm are jointly liable towards the injured, but the rule of EAL § 25 gives the courts discretion to determine the internal distribution of the loss between the responsible tortfeasors. Determining this distribution the court should inter alia pay attention to "existing liability insurance policies", see § 25 sec. 2. This authorization has been applied in *UfR 1999.83H* to hold as a "principal rule" that the whole burden of loss shall be born by the compulsory car liability insurance in cases in which both a pedestrian by negligence[22] and the driver of a motor vehicle, whether acting negligently or not, have brought about the same harm, even if, as is often the case, the pedestrian is covered by the liability insurance included in the ordinary home and personal protection insurance. Thus according to EAL § 25 sec. 2, both the insured and the non-insured pedestrian will be held non-liable in cases of gross but yet not quite unjustifiable negligence with respect to traffic accidents in which also the owner or user of a motor vehicle is liable, even if the driver cannot be blamed. The impact of the decision must be that the scheme of liability and insurance established by Färdselsloven (the Traffic Act) makes it natural to place the full loss on the compulsory liability insurance that covers liability of motorists to third parties. The insurance company can collect the necessary premiums. This is a clear rule. It deals leniently with non-insured tortfeasors involved. The rule and makes the handling of cases more efficient and quick.

UfR 1998.1137H held all the members of the supervisory board of a limited company liable for the loss incurred by the company from the moment the board should have stopped the running of business until the moment the company was adjudged bankrupt. The members of the board were jointly and severally responsible for full payment of the loss. The special rule of mitigation in ASL § 143 is normally not applied in relation to businessmen and other "professional" board members. Only one member of the board, that is the chairman who was a lawyer, had taken out a liability insurance and consequently his insurance company had to pay the entire compensation, cf. EAL § 25 sec. 2, 2. period. Lawyers are bound to have a liability insurance covering "financial liability that can be incurred by the running of a lawyer's office", cf. RPL § 127 (the Administration of Justice Act) and Advokatsamfundets vedtägt § 44 (the Bylaws

22 The judgement cites an – unlucky – statement made in the remarks in FT 1983/84, part A, p. 122f to § 25 in the bill, that EAL § 19, sec. 1 does not apply in cases in which both tortfeasors have taken out a liability insurance, and consequently the rule in § 19 sec. 2, no 1 is not valid with respect to an insured person who in his private affairs causes harm upon things covered by the injured's insurance of property, even though the opposite is clearly stated in § 25 sec. 2, 1. period.

of the Law Society). This liability insurance covers cases where serving on the board of a company is a normal element of a lawyer's business. The insurance functions as a general board liability insurance.[23]

In *UfR 1999.365H* general guidelines were laid down for the normal, internal distribution of the duly to pay damages in cases in which a company has been stripped of assets leaving only tax debts. *The seller* must pay an amount equivalent to the obtained enrichment, that is to say payment of the unpaid taxes minus the capital gains taxes paid. *The buyer's bank* must pay half of the remaining damages if the bank should have realized that the company was paid by the company's own money in contravention of the prohibition against self-financing in ASL § 115 stk. 2. The other half of the remaining loss must be paid by the seller's advisor, lawyer and accountant in equal amounts. The decision clearly states that the peculiar circumstances in the case do not suffice to deviate from this guideline. The message of this statement is that the specific discretion enabled by EAL § 25 is – understandable enough – turned into fixed rules. This makes room for the easy handling of a considerable amount of cases.

UfR 2000.2058H concerned with the internal distribution of liability between a private and insured tortfeasor and a county as public tortfeasor is another – and last - example of a decision that lays down a fixed and general guideline for the distribution of liability among jointly responsible tortfeasors. EAL § 20 juxtaposes public authorities, e.g. counties that are self-insured, with a tortfeasor covered by liability insurance. In case law, it is not obvious that a non-insured county is considered to be self-insured.[24] If so, however, the county is not responsible for payment according to the guideline concerning distribution as understood by the court in relation to EAL § 25.

23 Samuelson & Sögaard, *Rådgiveransvaret*, p. 108 and A. Vinding Kruse, *Advokatansvaret*, 6. ed., p. 162.

24 Self-insurance seems to presuppose the establishment of a specific internal "order" and not just an unprincipled pay as you go, compare Jens Möller, *Erstatningsansvarsloven*, 5. ed., p. 386f.