

# Compensation for Personal Injuries in Sweden – A Reconsidered View

Jan Hellner

In June 1986 two Swedish insurers, Skandia and Folksam, arranged an international colloquium in Uppsala in order to discuss the Swedish system for compensation of personal injuries, seen in relation to some other systems. The reports presented at the colloquium were later published in a volume entitled *Compensation for Personal Injury in Sweden and other Countries*.<sup>1</sup> For this volume I wrote a general introductory report called *The Swedish Alternative in an International Perspective*. The “Swedish alternative” was used as a general term for four types of insurance which have some fundamental features in common and which more or less replace tort liability in their respective fields.

Later the other Nordic countries – Denmark, Finland and Norway – followed the same path and introduced insurance for some types of personal injuries. They did not, however, follow the Swedish pattern in all respects. At present it is without doubt correct, as Professor Bo von Eyben does, to speak of a “Nordic model”.<sup>2</sup>

The “Nordic model” comprises several alternatives, which altogether form a rather complicated pattern. In view of the situation I should like to present my personal view of the subject, such as it has become as a result of the general development and partly also of my own change of ideas, slight as that may seem to others. At present I am more inclined than earlier to pay attention to the general development of the law of torts in Sweden and to historical factors in this development. This means that the present Swedish law must be seen in a somewhat wider context than before. The change of point of view leads me to confine myself

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<sup>1</sup> *Compensation for Personal Injuries in Sweden and Other countries*, C. Oldertz and E. Tidefelt (eds.), Stockholm 1988. Three of the reports presented at the colloquium were also published in 34 Am. J. Comp. L (1986): J. Hellner, *Compensation for Personal Injury: The Swedish Alternative*, pp. 613 ff., C. Oldertz, *Security Insurance, Patient Insurance and Pharmaceutical Insurance in Sweden* pp. 635 ff., and G. Calabresi, *Policy Goals of the “Swedish Alternative”* pp. 657 ff.

<sup>2</sup> See B von Eyben, this volume p 193-232 *supra*. For a more critical view B. Dufwa, *The Swedish Model of Personal Injury Compensation Law Reconsidered*, in *European Tort Law*, Liber Amicorum for Helmut Koziol, Frankfurt/M 2000, pp.109 ff.

to Swedish law, while duly acknowledging that the differences among the four Nordic systems may seem insignificant from an outsider's viewpoint.<sup>3</sup>

There is another difference from my earlier approach, which brings some further complications into the matter. When dealing with such a subject as the tort law of a legal system, it would be desirable to refer to "the law in action" rather than "the law in the books". Legal systems may appear rather similar when you look at statutes and case law but still function quite differently, because of differences in procedural law, in the influence of contract relations and of public law, etc. If what is desired is not only a description of the rules that the courts apply but something that can serve as the basis of an evaluation of the system, "the law in action" appears to be the important aspect. The true law in action is, however, practically inaccessible to the legal writer. Empirical investigations are costly, and in this field matters change so quickly that a study that is carried out with all methodological refinement may within a short time be outdated. Moreover, even if we acquire knowledge of a great number of facts, it is often difficult to say how much of that is law. We may have impeccable information regarding, e.g., compensation for permanent disability, but such compensation does not depend only on law but just as much on the medical causes of events that give rise to the claims of a plaintiff, or on doctors' opinions concerning these events, etc. On the other hand, it is also possible that the law in action is more similar in the different countries than the law in the books, for various practical reasons.

I shall therefore try to strike a middle way by starting from the legal rules but supplement them with information that can be expected to give a somewhat more reliable picture of how the law works. This information concerns insurance conditions and insurance practice that is more or less publicly known. I shall leave the rest in the zone of uncertainty that remains after having used these sources.

## **The General Background**

### ***Traditional Tort Liability***

From a general point of view, and with the important exception for the novelties that form the main subject of this essay, Swedish law on compensation for personal injuries does not appear to be very original. The main rule is based on liability for negligence, and it is for a limited number of activities supplemented by strict liability according to special legislation. As with other legal systems in the Western world, there are a number of detailed rules that are of interest chiefly to those who, perhaps accidentally and unexpectedly, come into direct contact with the system.

The present state of tort law in Sweden is not so much the result of a concerted effort to create a consistent system but the consequences of a long evolution, in which some factors that must be described as haphazard have played an important role. Those who believe that the unseen hand of economics governs the formation

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<sup>3</sup> Since this essay is a presentation of my personal views, I have not found it necessary to give references to other works. These would anyhow be in Swedish. For references to the "Nordic Model" in general see von Eyben, *op cit.* supra note 2.

of legal rules will find considerable support for this general idea, but perhaps not always in the conclusions that are drawn.

In the following I shall first give a general view of the development of tort law in Sweden, which demonstrates *inter alia* how much is due to historical factors or even to coincidence. I shall then give a description of the present system, focussing on the features that can be considered to be controversial. Finally I shall mention the questions of policy that are most strongly involved in the present debate.

Damage to property is to a large extent subject to the same principles as injuries to person in Swedish law. It is therefore possible that some of the principles that appear as dubious with regard to personal injuries are due to the fact that they apply also to damage to property. This is true of traffic damage insurance. Occupational injuries insurance, patient insurance and pharmaceutical insurance on the other hand cover only personal injury.

### ***The Emergence of a Law of Tort***

An important feature of Swedish civil liability law is the fact that, especially for injury to person and damage to property, there is no strict line dividing liability in tort from liability in contract. The Code of 1734, which still can be considered to be the spine of Swedish law, although not much of it remains in force, was not concerned with matters of principle, only with the regulation of special cases. There were some rules on special subjects such as damage or injury caused by animals – important in an agricultural society – but no rules that could be considered to refer to torts in general.

In the 19th century an attempt was made to introduce a complete new Code for both private and criminal law. The draft of the part relating to private law contained a chapter on damages (chapter 15), clearly aimed mostly at damages in contractual relations, but this chapter never entered into force. On the other hand, a Criminal Code (*Strafflagen*, literally “Act on Punishment”) was enacted in 1864. This Code contained in chapter 6 provisions on damages. As general statutory provisions on damages for torts in non-criminal cases did not exist at the time, and were not to be enacted until 1972, chapter 6 became the main statute on tort liability, containing *inter alia* rules on the liability of children and mentally deranged people as well as rules on joint liability of tortfeasors and on contributory negligence.

Even prior to the enactment of the 1864 Criminal Code, tort liability for negligence in causing injury to person and damage to property had been imposed by the courts without any statutory support. Neither the principles for imposing liability nor the reasons underlying these principles are very clear. The analogy to statutory rules concerning various contracts, which imposed liability for negligence, could be considered, and the general support provided by the rules of other legal systems – the *lex Aquilia* has been mentioned in legal literature – may have had a part in the development.

However, the certainty derived from case law regarding liability for one's own acts did not extend to vicarious liability, i.e. an employer's liability for the tortuous actions of his employees. There are a number of cases dealing with vicarious liability from the time before it was made subject to legislation in 1972, but

although attempts have been made in legal science, it seems impossible to find any clear principle in the cases.

It was settled at an early date that public and private legal persons were liable for the actions of their responsible leaders, in particular that a company was liable for the actions of its board of directors and its general manager. This principle has been, but not quite convincingly, associated with the general idea that a legal person is responsible for the acts of its organs. But it was uncertain how far down in the hierarchy of the leadership the circle of employees extended for whose tortious actions the legal person was liable.

There was a second basis for imposing vicarious liability: contract. In a contractual relation the employer, who is the contracting party, is responsible for acts of all employees in fulfilling his contractual duties, including the duty of not damaging the other party, unless there is some statutory provision relating to the subject. However, with regard to the contract of employment, the employer's contractual duty was considered to extend only to the fault of leading personnel, as in non-contractual relations.

Injuries to person are thus generally subject to principles modelled on typical tort liability, although there are exceptions for certain contractual relations based mainly on international conventions. For injuries to person due to motor traffic contractual relations are irrelevant. Liability for industrial accidents is subject to tort rules, although in many cases social insurance and private collective insurance will together give those injured in connection with work better compensation than tort liability. It would seem strange for a Swede to consider a hospital's or a private doctor's liability towards a patient to be based on contract; practically tort principles apply with due consideration of the peculiarities of relationships that are clearly non-business. Product liability is in Sweden based on tort law, and the courts have refused to apply principles of contract law even to a seller's liability towards a buyer for personal injury or damage to property. This position has now been confirmed by statute in the Sale of Goods Act of 1990 (sec. 67 para.1).

The main historical development did not affect strict liability. The question of introducing strict liability in tort became a subject of practical importance when modern means of transportation developed. Maritime law had for a long time been the subject of special legislation, imposing on the ship-owner tort liability for the negligence of all employees, regardless of their status in his business. This principle was confirmed in Sweden by a statute of 1891, and it still remains in force although the statute has been renewed. With the development of railways, the question of introducing strict liability became urgent, and legislation was enacted, with various rules for various situations.

Liability for motor traffic accidents is a specially important field, and the evolution in Sweden proceeded by steps. In 1906 it was laid down by statute that the owner of a car was responsible for the faults of the drivers, including all employees and family members as well. In 1916 this liability was supplemented by a presumption that an injury or damage arising from the driving of the car had been caused by the fault of the driver or of a defect in the vehicle, a device by which a kind of quasi-strict liability was introduced. There were special, complicated rules regarding liability when two motor vehicles collided. Liability insurance for motor cars was first optional but in 1928 and 1929 became compulsory. At the same time,

a direct action from the party suffering injury or damage against the insurer was introduced. As a result liability in tort was mingled with liability in contract. This situation gave a favourable grow-ground for legislation and insurance that make the same principles apply to personal injuries whether they can be said to arise in contract or in tort.

This brief sketch of earlier Swedish tort law proves, although the details have been omitted, that the legal situation at the time before reformation began was on the whole unsatisfactory. However, the practical situation was improved by insurance, particularly as from the middle of the 20<sup>th</sup> century the widespread use of package insurance, both for enterprises and for private persons, made liability insurance common for those who owned any property worth insuring. The package generally included liability insurance. The efficiency of tort liability as a means of reparation was of course enhanced when it was covered by the tortfeasor's liability insurance and the plaintiff's chances of recovery for his loss did not depend on the solvency and willingness to pay by the party responsible in tort. Moreover, the efficiency of liability insurance from the tort aspect depended to a considerable extent on the insurance conditions. Liability of enterprises generally covered the liability of employees for torts committed in the course of their employment and thus supplemented the lack of vicarious liability. Other details in the conditions need not be mentioned here.

## **The Reform Period**

### ***The Tort Damages Act 1972***

When the Nordic Ministers of Justice after the end of the second world war discussed fields in which common Nordic legislation was to be undertaken, tort law was chosen as one of them. The need for a reform, at least as far as Sweden was concerned, seemed evident. At first the plans for reform were very far-reaching. In order to lay down the general plans, experts from the various countries were appointed, among them from Sweden Ivar Strahl, Professor of criminal law in Uppsala, who was also an expert on tort law. He produced in 1950 a general report on the principles for the reformation of tort law. This report has had a strong influence in the long run, of which more will be said later, but it was both too radical in its fundamental ideas to be generally accepted and too wide in its scope to be implemented immediately. It was found necessary to limit the immediate work on reforming tort law to three special fields, for which an immediate need for reform was considered to be required. These were: vicarious liability, motor traffic accidents and the liability of the state and the municipalities. In addition it was found that, when the 1864 Criminal Code was to be replaced by a new Criminal Code, a reform that after long preparations was carried through in 1962, it was necessary to replace the old Chapter 6 on damages as well. Although reports on all four subjects were published around 1960, work proceeded slowly. It was decided to submit the reform of motor traffic accidents to further examination and to merge the other three proposals into one statute. This took a long time. *Skadeståndslagen*, here translated as "The Tort Damages Act", was finally enacted in 1972. In

principle, this statute applies to contractual liability as well (in agreement with the general tendency not to distinguish clearly between liability in contract and in tort mentioned at the beginning of this essay), but in practice its main importance lies in the field of torts.

The work on reforming tort law proceeded, and some changes in the 1972 statute, mostly relating to the computation of damages for personal injury, were introduced already in 1975. In the same year a statute on compensation for motor traffic accidents, *Trafikskadelagen* (1975:1410), here translated as “The Traffic Damage Act”, was also enacted. This Act will be treated separately in the following, in spite of the fact that it has some indirect consequences for tort liability in general, and that some of the consequences of the Tort Damages Act appear most clearly within the sphere of motor traffic accidents.

As can be gathered from what has been told of the preparations for reform, the new legislation did not aim at any complete reform of Swedish tort law. Some fundamental principles that were established by earlier legislation and case law remain unchanged or changed only in minor respects. The general pattern of Chapter 6 of the 1864 Criminal Code can in fact still be discerned in the Tort Damages Act. The *culpa* rule, or liability for negligence, remains the basis of Swedish tort law with regard to injury to persons and damage to property. The Tort Damages Act does not even mention strict liability, in spite of the fact that some of its provisions, particularly those on contributory negligence of a plaintiff and those of contribution among tortfeasors apply even to strict liability, unless a special statute contains provisions to the contrary. It is less surprising that the rules on the computation of damages apply also to strict liability in tort. Most of the statutes that related to strict liability and were in force in 1972 have now been replaced by newer statutes and others have been added, but the main picture remains the same.

Since the rules of the Tort Damages Act are clearly aimed at liability for negligence, it causes some problems to apply them when the tortfeasor is subject to strict liability. These are on the whole minor matters, and they will therefore not be discussed in the following.

Yet, there are some important features, which herald a new view on tort liability. Vicarious liability according to the Tort Liability Act makes an employer liable for the negligent actions of all employees undertaken in the course of their employment. This rule must be seen in connection with another rule in the same Act, which makes an employee liable for negligent actions undertaken in the course of his employment only if there are special reasons for imposing liability. This latter rule is sometimes seen as an acknowledgement of the fact that an employee will often lack the financial means of paying damages for any considerable amount and that the employer has “the deep pocket”. According to another view, which has support in the *travaux préparatoires* of the statute and which in my opinion is more realistic, vicarious liability is regarded as a kind of enterprise liability. The economic responsibility for negligent actions by an employee should fall on the employer and remain on him, generally without any possibility of recourse against the employee. The employer can acquire liability insurance that covers the liability, which the individual employee cannot, and thus transform the risk of a claim for a large sum of money, a risk that is rarely realised but then hits the tortfeasor hard, into a regular cost of insurance premiums. The conditions and the premiums for the

insurance can be adjusted to the employer's risk of becoming liable for the acts of his employees, but of course many other factors influence the conditions and premiums. The allocation of the liability to the employer is sometimes regarded as an instance of "channelling" liability in the general law of torts.

The matter mentioned now draws attention to the importance of insurance, in particular liability insurance. It is a curious fact that the *culpa* rule, which has its historical origin in a time when liability insurance played little or no role for tort liability, survives into a time when liability insurance has become the necessary supplement to tort liability. Although it is well-known that tort damages are regularly paid by insurance companies, much of the legal discussion continues as if liability were a matter between the party suffering injury or damage and the tortfeasor personally.

The Swedish Tort Damages Act acknowledges the importance of insurance, especially liability insurance, explicitly in a number of rules, most of them of comparatively small importance. There is a general provision (Chapter 6 article 2) which gives the courts the right of mitigating liability when enforcing a claim would cause extreme economic hardship to the tortfeasor. Since there cannot be any hardship on the tortfeasor if insurance covers his liability, this provision cannot be pleaded by an insurer who has undertaken to cover the liability. The case is similar with minors and mentally deranged people, for whom liability may also be mitigated according to special rules. However, the rule regarding the liability of an employee, which has been mentioned before, is not supposed to belong to this category, and the mitigation can therefore be pleaded even if liability insurance covers the liability. There is one provision that mentions insurance explicitly. Vicarious liability can be adjusted according to what is reasonable with regard to insurance and possibilities of insurance. This provision reflects the fact that, when the employer in 1972 was made responsible for the negligence of all his employees, it was feared that damage that was primarily covered by fire insurance might be transferred to an employer lacking liability insurance, because of the negligence of any one of his employees, a consequence that the legislator wanted to avoid. The insurance mentioned in the provision can be both insurance of property and liability insurance. In fact the only important case in which the provision has been applied by the Supreme Court of Sweden concerns a case in which a small enterprise, whose workers had negligently set fire to valuable property, escaped liability for what exceeded the enterprise's liability insurance coverage, when this coverage was found to correspond to what was normal in the circumstances.

The provision of the Tort Damages Act which has proved most controversial in the international discussion is the one concerning contributory negligence by a person suffering personal injury. Damages for personal injury are reduced only if the person suffering injury was guilty of intention or gross negligence. Since intention to suffer personal injury is rare and generally means attempted suicide, the limitation to gross negligence is the important part of the rule. Swedish courts have been reluctant to find negligence to be gross in tort cases involving personal injury. The result is that reduction of damages for injury to persons because of the injured person's contributory negligence is in practice almost entirely abandoned. The rule is, according to the *travaux préparatoires*, justified by social considerations: it is too hard on a person that has been severely injured to suffer a severe economic loss

perhaps for the rest of his life because of a moment's carelessness. The philosophy underlying this argument seems to be that, while strict justice would require the loss to be divided between the two parties according to the blameworthiness of the conduct of each of them, commiseration with the victim of a personal injury requires a deviation from the policy of justice. I shall return to the matter in connection with motor traffic accidents, for which the issue is most important. However, it should be mentioned already that in practice there seems to be general satisfaction with the present rule. Even the insurers, who in practice are the ones who pay the damages, seem to be satisfied with not having to investigate whether there is a basis for reduction and the extent to which damages should be reduced in personal injury cases. Cases in which the rule leads to unsatisfactory results can of course occur. One can imagine a case in which a private person, who has no liability insurance, with slight negligence injures another person who acts with much greater negligence. Even if it is unlikely that the injured person would enforce such a claim before a court of justice, the sheer possibility seems to constitute a defect of the law.

It has also been mentioned that the Tort Damages Act contains provisions on the computation of damages. Of special importance for the present subject are the provisions on the relationship between tort damages on the one hand and social insurance and sick-leave payments and other benefits from employers on the other hand. Once more, the development seems to have been somewhat haphazard. When the rules on social insurance, including public health insurance, old-age pensions, disability pensions, survivors' pensions and compensation for occupational injuries were reformed and most of them merged into one statute in 1962, it was found that the earlier statutes contained different rules regarding recourse from the social insurance against those responsible in tort. The simplest solution to the problem of achieving unity was found in abolishing all such recourse completely, and this solution was chosen. If an injury gave rise to tort liability the damages were accordingly reduced by the whole amount of the benefits from the social insurance. These rules were consolidated and somewhat extended by a provision in the Tort Damages Act in 1975, and they still remain, although there have been several amendments concerning details. The most important consequence is that motor traffic liability, regardless of its technical construction and of all details, is relieved of the costs that are initially paid by social insurance. The merits and demerits of this principle can hardly be discussed without taking into account how motor traffic in different ways contributes to the costs of social insurance and of motor traffic accidents in general. This is a complicated matter, subject not only to legal considerations but to political controversies. It cannot be discussed here, although the results must be taken into account.

As a result the role of tort liability for personal injuries has been reduced to providing indemnity for non-economic loss, including pain and suffering, filling in losses of income exceeding those indemnified by social insurance, and also covering some gaps in social insurance. The allocation of losses that are or might be covered by social insurance or by direct payments from employers are, as just indicated, subject to political considerations. At present (August 2001) the issue is subject to investigation by a special commission whose members have been appointed on a political basis.



### ***The Traffic Damage Act of 1975***

The character of *Trafikskadelagen*, the Traffic Damage Act, can largely be explained by ideas presented by Ivar Strahl in his previously mentioned report from 1950. These ideas can only be very briefly summarised here, but they are important for the understanding of the Traffic Damage Act. Strahl rejects in principle the tort liability system as a suitable means of indemnifying injury to person and damage to property. In consequence, first-party insurance, i.e. for injuries to person collective and individual accident insurance, is preferred to third party insurance, i.e. liability insurance, as a means of reparation. Closely related to this idea is the one that insurance protection, whether first-party or third-party, should have as its primary object to indemnify the party suffering loss. This general idea can be supported by economic considerations, since a chief reason for choosing first party rather than third party insurance lies in the supposed lower costs of administrating the former one. On the other hand, deterrence by tort liability plays only a limited role in the system envisaged by Strahl.

Strahl's ideas were strongly opposed when they were first presented, but they remained influential. The reform of social insurance, which has been mentioned here previously, in fact operated to Strahl's advantage. The question of whether the potential tortfeasors or the potential victims should bear the burden of insuring against losses from injuries to persons had, for the main part of the economic losses, been removed from the area of dispute by the State taking over the burden by social insurance. Strahl's ideas also gained support from other sources, in particular the emergence of no-fault insurance in the United States and the proposals of André Tunc in France.

This is the background against which the Traffic Damage Act should be seen. The Swedish text of the statute makes complicated reading, but on the whole the principles are fairly simple, especially with regard to personal injuries.

The technical construction of the Traffic Damage Act is that of insurance in favour of those suffering injury to person or damage to property from motor driven vehicles (in the following for the sake of brevity called "cars", although even motorcycles are included). In practice the system does not differ much from strict liability in tort combined with compulsory liability insurance. It is unlikely that the Swedish insured noticed the technical differences in so far as they did not involve any material changes. The insured probably noticed a rise in the rate of premiums, but for most of them, as indeed for anyone who is not an expert in the field of rating, it was hardly possible to perceive the exact reasons for the increased rates. These reasons included, besides the new material features of the insurance, the rising level of compensation, which in turn depended partly on the rate of inflation.

The technical construction can be explained by Strahl's influence, which has just been mentioned. For him it was important that the person seeking redress should not regard the motorist responsible for an accident or anyone else as his adversary as far as compensation was concerned but turn to the insurer as the party that handled the administration of the compensation system. The fact that the Traffic Damage Act is not based on any principle of tort liability is reflected in the fact that the benefits due under the Act are not styled "damages" (*skadestånd*), although there is a general provision that they should be computed according to the rules

regarding damages in the Tort Damages Act. The Swedish word used is *ersättning*, which can be translated as indemnity.

With regard to injuries to person the principle of the Traffic Damage Act is simple. Each and everyone who is injured by the operation of a car is entitled to an indemnity, with exception only for injuries due to nuclear activity. Whereas the earlier statute based liability on a presumption of either fault or a defect in the car, the new insurance is based on strict liability, in the form of an unconditional right to an indemnity from the insurance attached to the car. Even the driver has an unconditional right to an indemnity. This latter principle has been criticised firstly on grounds of principle, secondly as to the absence of exceptions.

The principle that the driver is covered by the compulsory insurance is of course not consistent with an idea of a traffic insurance being a liability insurance, since a driver, whether at fault or not, cannot be liable in tort towards himself. This principle is considered to be one of the cornerstones of the Swedish insurance, and it is fully consistent with Strahl's general ideas. There are several reasons for this principle. One is that the driver is as much in need of insurance protection as anyone else injured by motor traffic. As a matter of social policy, it was therefore considered desirable to have the driver covered by the compulsory insurance. Before the introduction of the present traffic insurance a voluntary driver's accident insurance was common in Sweden, as in many other countries. But it was commonly held by those who had any insight in the problem that this protection was not sufficient for cases of severe injury. This view has later been confirmed by the Danish experience, since the Danish traffic insurance, although it in many ways resembles the Swedish one, does not include the driver in the protection of the compulsory insurance. In addition, the costs of administrating the insurance are diminished if all persons injured are covered by the same compulsory insurance. Moreover, there are aspects of deterrence that are not easily realised when the rules are discussed on an abstract level. The fact that the driver is covered has led to high premiums for traffic insurance of heavy motorcycles, since these vehicles are extremely dangerous not only for third parties but also, and principally, for the owner-drivers. In fact, the premium rates are gradually making such vehicles much less attractive to would-be owners, with a corresponding reduction of motor traffic accidents in which heavy motorcycles are involved.

Even if it is admitted that compulsory inclusion of the driver is justified as a general policy, the almost total absence of exceptions in the Swedish traffic insurance has given rise to criticism. The most conspicuous feature is that even a driver who has stolen a car and is injured in an accident with it is protected. As a reason for this generosity social arguments have been proffered – the traffic insurance has been said to have strong features of social insurance. The desire to avoid complicated rules has also been mentioned. In my opinion the criticism of the absence of any exception is justified, although not sufficient to discredit the whole principle of including the driver in the compulsive coverage. Suitable modifications in the insurance coverage should have been sufficient to avoid the undesirable results.

There are also other significant features in the protection of the driver. Injuries to drivers and passengers are covered by the insurance of the car in which they are travelling, and they cannot make any claim against the insurance of a car with

which this car is colliding. The general idea is that claims for indemnities are best settled by one insurer alone, and this one is the insurer of the car in which an injured person is travelling. This is supposed to minimise the aspect of adversity between an injured person and an insurer. In collision cases the driver and passengers of each of the colliding cars will thus turn to the insurer of that car for compensation for his personal injury. It will then have to be decided between the two insurers who have insured the colliding cars which of them shall ultimately carry the burden of the costs of the personal injuries, as well as other costs for which both sides may be responsible. This decision is in principle made on the basis of faults of drivers and defects of the cars involved in the accident. It is assumed that the insurers will generally limit the costs of such decisions by resorting to standardised factors according to agreements among them.

The protection of the driver has yet another aspect. Under the traditional system of tort liability which includes a reduction of damages because of contributory negligence by a person suffering injury, both drivers of two colliding cars cannot receive full damages for their personal injuries from the parties involved in the collision or their insurance. If one driver is guilty of negligence causing liability towards the driver of a colliding car he is also guilty of negligence contributory to his own injury. If cars A and B collide and two-thirds of the blame for the collision are laid on the driver of A and one-third on the driver of B, the driver of A (or rather his liability insurer) will compensate the driver of B for two-thirds of his loss, and the driver of A receive compensation for one-third of his loss from the driver of B (or rather B's liability insurer). Only in the rare case of neither one being at blame for the collision might they receive full damages. This consequence of the traditional system was pointed out by the French writer André Tunc, and a strong factor in the construction of the Swedish system was to avoid this consequence. Under the system introduced by the 1975 statute the general rule for personal injuries prevails, i.e. indemnity is reduced only in case of intention and gross negligence. To these are added negligence (which need not be gross) by an intoxicated driver, who when the statute was enacted was not considered to deserve the general protection of most drivers.

As for other personal injuries than those suffered by drivers, the Swedish system simply imposes strict liability. If two or more cars are involved in causing the injury, the injured person can sue the traffic insurer of either, and the ultimate allocation of the costs will then be an issue between the two insurers. As for contributory negligence of the injured person, the general principle prevails, i.e. the indemnity is reduced only in case of gross negligence or intention. Those suffering personal injury in such cases are generally pedestrians and people travelling on bicycles. The fact that injured pedestrians are often children or elderly people has reinforced the decision to treat them leniently in case of contributory negligence.

In short, the Traffic Damage Act is based on a principle of legal policy that differs entirely from traditional ideas of tort liability. This policy is not to make any party responsible for his or her fault or action but to provide suitable insurance protection to those involved in motor traffic accidents at the lowest possible cost. An important aspect of lowering the costs is to avoid disputes regarding the right to compensation for personal injuries due to motor traffic. The statute seems to have reached its purpose in this respect, since disputes regarding an injured person's

right to an indemnity have become rare. The disputes and the litigation that occur are almost wholly concerned with the computation of the compensation, and in this field there is considerable dissatisfaction at present. These questions cannot be discussed here.

The prevention of accidents and the best allocation of the costs for accidents is not an explicit object of the statute. The *travaux préparatoires* stress that the statute is not based on any aim to impose punishment for blameworthy conduct. Such a statement obviously refers to the situation after an accident has occurred. An issue that is more important in the long run concerns the effect of the statute on the general standard of care in motor traffic and on the economic efficiency of the compensation system. An example, which serves to illustrate the complexity of this problem, has been mentioned already, i.e. that of accidents connected with the driving of high-power motorcycles. It seems very likely that changes in the compensation system and its financing will influence the cost of travelling by car and thus the occurrence of motor traffic accidents. However, all estimations of such effects are extremely uncertain, for several reasons. Motorists and others do not know the principles of rating that the insurers employ, and these principles are adjusted to many more factors than those connected with the risk of personal injuries. Whereas until some years ago the Swedish insurers seem to have based the rating only on a few and easily accessible facts, such as the make and age of the vehicles insured, modern computer technique enables them to differentiate premiums according to a number of factors that are unknown to the insured. They can thus hardly affect an insured who wants to have good insurance at a low price. Competition among insurers plays an important role. Consequently we are in the dark, and theoretical considerations may only create a false impression of knowing something. This observation also applies to general considerations of allocating burdens in a way that furthers economic efficiency. I shall return to the matter from a more general point of view later.

### **The Later Development**

The two statutes that have been discussed now represent the main results of the reform of personal injury compensation that started after the second World War as far as legislation is concerned. The further development, which supplements the reform by legislation, has taken place in the sphere of private insurance, although to a considerable extent with the co-operation and under the supervision of the State. It is thus closely connected with the law of torts in the sense mentioned initially. It also forms part of what has been called the “Nordic model”. The types of insurance that should be taken into account are, in chronological order of their coming into force, the “Security Insurance for Occupational Injuries”, the “Patient Insurance” and the “Pharmaceutical Insurance”, and I shall deal with them in that order. They are the subject of another essay in this volume, and I shall therefore confine myself to some general traits that are particularly pertinent to tort law in general.

### ***Occupational Injuries***

The Swedish system of compensating occupational injuries is somewhat peculiar and depends largely on historical factors that go back to the 19th century. They need not be described here, except for one special feature of permanent importance. The right to benefits from workmen's compensation, which was introduced in 1901, did not in Sweden prevent an injured employee from suing the employer for damages for negligence under general principles of liability, although the benefits from workmen's compensation were deducted from the amount of damages. This principle still prevails, in spite of the fact that the workmen's compensation has by a number of steps developed into a special kind of social insurance, which covers not only industrial accidents in the common sense of the word but work-connected diseases as well. Moreover, the self-employed and employers as well as employees are included in the insurance. This public insurance is regulated in the Occupational Injuries Act (*Arbetskadlagen*) 1976. There is, as has been mentioned previously, no recourse from the social insurer towards a tortfeasor.

The extent of the social insurance is important principally for two reasons. Since the benefits are deducted from tort damages and from insurance indemnities that replace damages, the rules relating to such benefits have an indirect influence on the amounts of damages and indemnities. These rules have been subject to considerable changes during the period that the statute has been in force. As a consequence tort damages and the corresponding indemnities are at present most important for permanent disability for which the social insurance provides limited cover on the one hand, and compensation for pain and suffering on the other hand. The other reason is that the private collective insurance, which will soon be mentioned, refers for deciding its coverage to the Occupational Injuries Act. In other words, the connection with tort liability has, as far as the events giving rise to an indemnity are concerned, been abandoned in favour of the delimitation found in the public Occupational Injuries Act.

As mentioned before, the Tort Damages Act makes the employer vicariously liable for injuries caused by the negligence of all his employees, even when the injured person is another employee. Although this reform was considered important at the time when it was carried through, it was soon found to be insufficient. The injured employee was considered to require a better protection than could be provided by finding a negligent person among his fellow employees and suing his employer. There were some cases that gave rise to special criticism, among them injuries suffered by longshoremen working for foreign ships that after a short time left Sweden and whose owners could not be reached even though they were liable. Strict liability covered by insurance that was in practice compulsory was therefore demanded by the trade unions. The next step was to require the same protection for all employees belonging to trade unions. The means of extending the employers' liability was this time found in collective agreements. The trade unions of course favoured such a development, and to the employers the extension seemed practical, in so far as it prevented disputes about negligence that were costly and disagreeable. Practically all standard collective agreements now impose on employers bound by the agreements a duty to procure a special, private insurance, called "security insurance for work-connected injuries", in favour of their

employees, whether belonging to a union or not. This insurance provides indemnities that aim at the same level as regular tort damages. They are, however, more standardised than tort damages, in order to facilitate the adjustment of claims and thus diminish the transaction costs. According to the collective agreements, adherence to the collective agreement on “security insurance” protects not only the actual employer of the injured person but also other employers, adhering to the insurance, against tort claims from employees entitled to benefits under the insurance.

Since collective agreements are very widespread in Sweden, most employees are protected on the same level as tort damages by the special insurance, regardless of any negligence by the employer or of other employees. Only those employed in branches where collective agreements are not common, such as house workers (in so far as such exist at present), gardeners who are regarded as temporary employees, and some others, depend on tort damages for the reparation of what exceeds the benefits under the Occupational Injuries Act.

The present system thus provides most employees with protection on the tort damages level without any regard to negligence by the employer, by any of his employees, or by any other employer. Especially the fact that there are two different types of insurance, one public and one private, one compulsory and one quasi-compulsory, that cover exactly the same events, may seem puzzling. The most obvious reason for this arrangement is that social insurance never provides compensation for pain and suffering, which is generally regarded as one of the mainstays of tort damages. An additional reason seems to be that the trade unions and employers' organisations prefer to be able to decide matters between themselves, without depending on political decisions of the legislators.

As mentioned, there are some gaps left, and for the most important of these there is generally special insurance available. For instance, self-employed farmers can resort to insurance tailored to the event that a farmer may be temporarily disabled and in need of a substitute to take care of the farm.

The system, however, has produced some problems. When the public Occupational Injuries Insurance became expensive for the State, the benefits were reduced. As a consequence the gap between the level of the social insurance and the level of tort damages, which were not affected by the change in the public insurance, widened, and the security insurance in the employers' view threatened to become too expensive. In consequence, even the benefits from the security insurance were reduced. But since the employees who were entitled to full tort damages under the Tort Damages Act could not be deprived of them by a collective agreement, special provisions were introduced for such cases. It is difficult for an outsider to form an opinion on the value of this arrangement, which certainly contradicts the original idea underlying the security insurance.

The insurance that has been mentioned now offers some interest also by the way in which private insurance co-operates with social insurance. Such is of course the case everywhere – at least in Europe no system of indemnifying personal injuries can leave social insurance entirely out of view. But so close an adjustment of collective private insurance to public insurance is probably unusual. The situation moreover illustrates the problems that ensue when a quasi-compulsory arrangement

depends on the future development of a public, compulsory insurance that is subject to political decisions.

### ***Patient Insurance***

Medical responsibility for a long time attracted little attention in Swedish law. Hospitals and doctors were liable for negligence, but patients seldom received any damages. Lawsuits were rare and often resulted in dismissal of the claim, because no negligence sufficient for imposing liability was found. According to a reliable estimate, around a hundred patients received some kind of indemnity yearly: by lawsuits, private negotiations or as *ex gratia* payments.

This situation was considered unsatisfactory, because of the low number of patients that received any indemnification. Proposals for legislation were discussed. However, it was found that a private solution was preferable. Since those responsible for medical accidents were mostly public hospitals, managed by counties or municipalities, it was comparatively easy to construct a system of reparation by an agreement between the associations of these public bodies and a group of insurers, who were willing to provide insurance. Private practitioners followed suit by adhering to the insurance through their organisations. The negotiations took place under the unofficial supervision of the Ministry of Justice.

The main reason for the introduction of the “patient insurance” in 1975 was thus the aim to improve the situation of injured patients. The right to an indemnity was decided by the insurance conditions, which were fairly complicated but aimed to be easily applicable in practical cases. The conditions also decided, although in somewhat broad terms, the amounts of compensation. These were on the tort damages level, although with some modifications intended to keep the indemnities within reasonable bounds.

The conditions were detailed. There was a general aim to make it possible to decide whether an injury justified compensation by direct application of the conditions. Although there was no clear statement regarding the general aim of the insurance conditions, some features can be discerned fairly clearly. Fault was no prerequisite of compensation; there should be no necessity of raising this general issue, which would put patients in opposition towards doctors, nurses and hospital administrators. On the other hand the conditions were so framed that all cases where blameworthy conduct had occurred should be covered; the insurance should not place the patient in a worse position than liability for negligence would. But the insurance coverage went beyond this limit. The general policy underlying the choice of events giving rise to a right to an indemnity can be described thus: The insurance should not cover the consequences of the ailment for which the patient sought care, and not even for consequences of that ailment that could be considered normal even if unlucky. On the other hand it should cover extraordinary consequences that were not sufficiently connected with the original ailment. Thus, even pure accidents might give rise to a right to an indemnity. For most situations the events that led to the injury were judged *ex post*, on the basis of what was known at the time when the claim was raised, not *ex ante*, as according to tort law when negligence is decisive and the main question is how the doctor or other

person responsible should have acted on the information that was then available to him or her. Personally, I would express the aim of the insurance to be to provide indemnity for injuries that were not reasonably foreseeable as consequences of the ailment for which the patient sought care, in short medical accidents. The aim now described may give some general idea of the construction of the insurance, but of course there are many disputable situations. A special board was appointed which gave its opinion on such cases, and if the parties were not content with the opinion of the board, the dispute went to arbitrators. The courts would thus not be involved.

According to the general policy underlying the insurance it is preferable to have a comparatively large number of injured patients receive compensation, somewhat sparingly computed, than to have a limited number receive generous restitution of economic and non-economic loss. This policy can be said to have succeeded, in so far as at present about 9,500 demands for indemnity are made annually, and indemnities are awarded in about 45 percent of these cases.

In these and in other features of the patient insurance can be found the aim to keep costs of administration and settlement of claims as low as possible, on the policy that it is better that the money goes to those who are injured than to the administration of the system or to lawyers arguing in court. Having a right under the patient insurance conditions did not prevent a patient from suing for damages in court, but the advantages offered by the patient insurance were sufficient to make such suits extremely rare.

As mentioned, the patient insurance was originally a private insurance governed entirely by the insurance conditions. There have been complaints against various details, chiefly because of some gaps in the protection and because the indemnities have been considered too low. As an example can be mentioned the sums that have been awarded to those who have been infected with HIV-virus by blood transfusions (at a time when such virus was unknown and therefore no charge of negligence could be made). There has been general satisfaction with the fact that compensation was given in these cases, but it has been considered too low. On the whole, the general system has met with approval, except by those who start from the assumption that fault and no other circumstances should give rise to damages and that the damages should cover the whole loss of the party injured. Doctors and hospital authorities have been content not to have their principal activity disturbed by having to defend themselves against claims for damages.

After some years the demand for legislation was renewed. Although the gaps in the voluntary system were few, owing to the fact that most of those who practice health care in one form or another are organised in associations which include the costs of insurance in their contributions from members, it was considered desirable to fill these gaps. It was also considered undesirable from a general point of view that such an important type of injury as injuries to patients should in practice be excluded from trial by the courts. The insurance conditions contained some gaps that were thought undesirable, *inter alia* for mental illnesses not connected with any bodily injury. There were other details in the conditions that were considered unsatisfactory, especially in comparison with the Danish system which was largely modelled on the Swedish one but which had made some improvements.

Accordingly, a special statute, the Patient Injuries Act (*patientskadelagen*), was enacted in 1996 and entered into force in 1997. It follows the earlier voluntary



insurance rather closely, especially by the technique of enumerating in considerable detail the events that give rise to compensation. A notable gap, which still remains in the statute, is that the insurance does not cover lack of information and informed consent to treatment from a patient. This is a controversial question, and the legislature did not want to decide it by a statute intended to reform patient insurance. Such omission will therefore continue to be judged by the courts on the basis of negligence.

Adhesion to the insurance is compulsory, which means that some practitioners, who earlier were not insured, now have to subscribe to the insurance. The institution of a special board that gives advice on disputed claims is retained in the statutory organisation, but the disputes that remain are decided by the ordinary courts, not by arbitrators.

The awards are not called “damages” (*skadestånd*) but “indemnity” (*ersättning*), although their computation is decided by a reference to the Tort Damages Act (a resemblance to motor traffic insurance can be noted here). There are a few special limitations to the amounts.

A patient is still free to choose to go to court if he or she prefers, and then of course the limitations do not apply. As already mentioned, questions based solely on lack of informed consent will have to be decided by the courts. Opinions differ on the question whether it was right to exclude these cases from the insurance.

### ***Pharmaceutical Insurance***

Sweden also introduced in 1978 a special “pharmaceutical insurance” (*läkemedelsförsäkring*) for injuries caused by pharmaceutical drugs. The reason for the introduction of this insurance seems to have been the practical need for a solution of a practical problem. A draft European Convention on Products Liability did not seem ever to come into force. It was known that EEC worked with the subject. Some measures seemed necessary in order to cope without delay with the practically most important part of products liability, that of liability for pharmaceuticals. The same procedure was chosen as originally with patient insurance: to leave the matter to private initiative under the supervision of the Ministry of Justice.

The result is in important respects similar to the patient insurance. For the injuries concerned the organisational situation favoured the creation of the insurance. Since all distribution of pharmaceutical drugs is subject to licensing and both national manufacturers and foreign importers are organised in associations, it was easy to enlist the assistance of these organisations in organising the insurance. The administration of the insurance is fairly simple. Claims under the pharmaceutical insurance are handled by an insurer who in practice co-operates with the insurer that adjusts most claims from patient insurance. This arrangement is justified by the fact that it may sometimes be open to doubt whether an injury falls under the one or the other of the two types of insurance.

The pharmaceutical insurance is still entirely private. The insurance conditions are detailed, and a considerable number of conditions contain a somewhat arbitrary element. The decisions are therefore *a priori* often open to doubt. The claims are

primarily handled by a special board, in which various groups of interested parties are represented. A large number of claims are dismissed. The decisions of the board can be taken by appeal to a board of arbitrators.

The pharmaceutical insurance is based mainly on the same ideas as the patient insurance, and in fact the same person, Mr. (now Med. Dr. h.c.) Carl Oldertz is the real originator of both.

In contrast to liability based on negligence, or even on defects in sold goods, the pharmaceuticals insurance is based on the idea that serious accidental consequences of the use of pharmaceuticals should be indemnified. Much will depend on the circumstances. Clear mistakes, such as administration of the wrong drug or too strong a dose of the drug, will qualify for indemnification, but even cases where no mistake has been made may give rise to a right of compensation. Many cases concern the side effects of drugs, and these must be judged on the basis of the whole situation. Serious illnesses require the use of dangerous drugs, and if these have unfortunate effects they should not be indemnified. On the other hand, some drugs that are generally harmless may, because of unforeseeable circumstances, cause considerable harm, which should be indemnified. A typical example is HIV contamination by the transmission of blood plasma to haemophiliacs. At the time when the transmission occurred, HIV was unknown, and no blame could be laid to those responsible for the fact that there was a risk unknown even to advanced science. Yet the victims received compensation (although there have been complaints that the amounts were too low). There are certain maximal amounts that should prevent the insurance from becoming too costly.

As a background it may be noted that Sweden has adhered to the EEC directive on products liability and introduced corresponding legislation (The Products Liability Act (*Produktansvarslag* 1992:18)). However, the pharmaceuticals insurance, especially by not requiring that there has been a defect in the product, goes further in the protection for personal injuries. The maxima of the pharmaceuticals insurance of course do not apply to damages under the Products Liability Act. A main advantage of the pharmaceuticals insurance, as with the other kinds of insurance mentioned here (with the exception of the Motor Traffic Insurance) is found in the fact that generally speaking the procedure under the pharmaceuticals insurance is less costly to the injured party than resorting to the public courts. As a kind of safety valve against the risk that those who decide the indemnities from the pharmaceuticals insurance are too sparing in awarding amounts, the person suffering injury can always sue for damages in a court of justice.

## **Some General Features**

### *Similarities and Differences*

When speaking of the Swedish model of compensation for personal injuries I will now – which I have not done when I have written on the subject before – try to see the system as a whole. I shall not only deal with the four special types of insurance that have been mentioned here, but the whole field. The general principles of the law of torts, as applied to compensation for personal injury, form as much a part of

the Swedish model as the special kinds of insurance. However, it is not possible to describe the whole system in any detail; only what can be considered to be original features of the Swedish system will be mentioned. Original does not mean unique; similar features may be found elsewhere although hardly in the same combination.

For the great majority of cases in which the possibility of getting compensation can arise the *culpa* rule, including vicarious liability, prevails, in Sweden as in most other countries in the Western world. There are two features of the Swedish rules that have been mentioned before that can be considered to be characteristic of the Swedish system. The same features appear when a tortfeasor is liable according to some special rule, whether of the *culpa* type or of strict liability. They are also found in the special kinds of insurance with which we have been concerned here.

These two features are: The damages are not reduced because of the contributory negligence of the person suffering injury, except for some especially grave cases. Indemnities for lost income are reduced by benefits from social insurance and from some other sources that are put on a par with such insurance, and there is no recourse from the insurance towards a tortfeasor. These features can consequently be considered to be fundamental to the Swedish model at least for the present time. Other features are found in the four types of insurance that have been mentioned here.

Most conspicuous in the remedial system of the Swedish model is of course the technical construction as an *insurance in favour of those entitled to compensation*. In my opinion this feature should be regarded as one of legal technique, rather than of legal policy. As remarked with regard to motor traffic insurance, practically the same results as with the Swedish construction can be reached by strict liability combined with compulsory liability insurance, supplemented with the protection of the driver. In fact, this is the technical construction chosen with regard to motor traffic injuries in Norway. It may be a matter of opinion which legal technique suits the contents of the rules and the facts best. When the amounts of the indemnities are decided by a reference to tort rules the liability conception may seem more appropriate. On the other hand, if there are more than small differences from tort principles, it is hardly possible to sustain the liability construction.

A common feature, which distinguishes this system from traditional tort law, is found in the fact that *fault is almost completely rejected* both as the basis for entitlement to compensation and (as mentioned already) as a reason for reducing an indemnity for personal injury. This feature does not imply that the person suffering an injury can be less favoured than he or she would have been if the special system had not been introduced. Such a consequence is avoided by various means of legal technique: by giving the injured person the option to invoke tort rules rather than the special system of indemnification if he or she so prefers, or by incorporating tort principles in the insurance conditions.

In the background we find Strahl's ideas. In his opinion the tort system was wholly unsatisfactory as a system of providing reparation for economic losses, in particular losses arising from injuries to persons. Instead, he maintained that losses should primarily be covered on the side of the party suffering the loss, either by social insurance financed by the state or else by legislation or under collective agreements laying the burden on those who would suffer losses. In his opinion, only extra-hazardous activities, which typically cause losses in excess of what

could be considered comparatively normal, should in principle be burdened with the external costs of these activities. Strahl also preferred a system in which a fairly great number of people would receive a limited compensation to one in which a few would get the whole of their losses indemnified, whereas the great majority would receive nothing, as is typical for the tort system. Those who required better compensation than compulsory social insurance provides should in Strahl's opinion pay for it themselves, by procuring accident or sickness insurance.

The system that we find now is, in comparison with Strahl's ideas, much more pragmatic, as has appeared from the preceding survey. No one who would be entitled to compensation on the tort damages level will be left with only social insurance under the present system. The problem of finding suitable criteria for compensation on this level will then be removed. Since not everyone who suffers a personal injury can receive full damages on the tort level, even if the duty to pay such damages is placed on an insurer, it is necessary to find some practically workable means of limiting the right to indemnities. As a main rule, negligence by a tortfeasor represents the best solution to this problem, since it prevails whenever there is no special legislation or other particular basis for liability. The *culpa* rule is supposed to strike a reasonable balance between the interests of parties suffering injury or damage and tortfeasors, and it is sufficiently flexible to take account of a great number of different circumstances. In addition this rule generally satisfies the opinions of those who take a moralistic view of the law of torts and regard the imposition of liability to pay damages as a suitable sanction against a wrong, notwithstanding the fact that under modern circumstances damages are generally not paid by the tortfeasor but by an insurer.

On the other hand, if there are other suitable criteria, these should be considered. Such is the case with the four types of injury covered by the special systems found in the Nordic countries. These criteria can be justified on pragmatic grounds. Those responsible primarily for the costs are easily found, since they are registered for other reasons; they belong with few exceptions to organisations that can ensure that the liability to procure insurance is fulfilled in all normal cases; and moreover, there are good reasons for entitling at least a majority of those suffering injury to better indemnities than ordinary social insurance provides. Finally, the transaction costs (in a general sense) are reduced, which means that a larger share of the moneys spent on the insurance premiums go to those who are injured than is the case in a tort system which will engage lawyers on both sides.

The other common feature, which is closely connected with the first one, is the *reliance on insurance* to cover losses that might be a disaster to a single person by dispersing them among a number of premium-payers. This is of course not original with the Swedish model, but it is carried through to an unusual extent. As mentioned before, modern tort liability would be impossible without its connection with insurance. Under the Swedish system the insurance is compulsory, or quasi-compulsory, by being supported by organisations that have approved of it because of its advantages for their members. This feature is perhaps most easily discernible with regard to patient insurance, which is strongly supported by the medical profession. It is not voluntary from the individual tortfeasor's or potential tortfeasor's point of view.

These are the most conspicuous aspects of legal technique. In spite of the fact that for tort law in general, as it appears in the Tort Damages Act, Swedish tort law is mainly based on liability for *culpa*, there are good reasons for holding the technical construction as insurance in favour of those suffering losses as the distinctive feature of the “Swedish model”. Although the most original feature of this model is the replacement of negligence or quasi-negligence by “medical accident”, as a prerequisite of a right to an indemnity, in view of the construction of both motor traffic accident insurance and “safety insurance for occupational injuries” too much stress should not be laid on the ideas underlying patient insurance and pharmaceutical insurance when discussing the Swedish model as a whole.

However, the features of legal technique that have been mentioned now do not account for more than part of the principles that govern the types of insurance under review. If we look closer at the four types, we find that they differ considerably, and the differences can hardly be explained on grounds other than historical.

*Motor traffic insurance* had existed for a long time before the present system was introduced. Apart from the technical construction (which was discussed earlier) the factual novelties are limited. Most important are including the driver in the compulsory protection scheme, and abolishing the reduction of indemnity for personal injury because of the fault of the victim in all normal cases. Since the indemnities are computed in strict accordance with the Tort Damages Act, there is nothing original to be found in this particular field.

The circumstances that give rise to compensation from the *security insurance for occupational injuries* on the level of tort damages seem in my opinion somewhat curious in retrospect. It is easy to understand that the trade unions wanted to introduce full economic protection for all industrial injuries, not being content with the limited amounts that the public Occupational Injuries Insurance awarded nor with the limited extension that the tort rules, including the rules of vicarious liability, offered. It is perhaps also easy to understand that the employers' organisations would be willing to accept such a principle, since the drawbacks of the system that had been introduced by the Tort Damages Act 1972 were clear as far as typical industrial injuries are concerned. However, the consequences of attaching the private “security insurance for occupational injuries” to the public Industrial Injuries Act may not have been fully realised at the time of the creation of that insurance. In the first place, when the Industrial Injuries Act was succeeded by the Occupational Injuries Act, a great number of new events were included in the security insurance coverage. Whereas originally the injuries that the security insurance covered could be expected to coincide with those entitling to damages under tort law, with the modification that negligence no more had to be proved, the same is hardly true for the new legislation. It is difficult to believe, e.g., that unfavourable working conditions would give rise to liability in tort to the same extent as the circumstances relevant under the Occupational Injuries Act. Moreover, when this extension became so costly that it induced the legislature to reduce the protection afforded by the public Act, the gap between the public insurance level and the tort damages level which the private insurance was to fill widened. As a consequence the private insurance was changed as well, in a way that does not agree with the original idea of rejecting negligence as a criterion.

Only the *patient insurance* and the *pharmaceutical insurance* can in my opinion be said to exhibit the features that are fully characteristic of the “Swedish model”. The fundamental criteria are no more negligence and defect, which put the defendant's behaviour in the foreground, but circumstances that focus on what the person suffering injury could reasonably demand under the circumstances. The change is most notable in patient insurance, in which the enormous increase in successful claims (which has been mentioned previously) illustrates the importance of the new philosophy. Other important aspects of the reform are the reduction of transaction costs and the limitation of the amounts of compensation that are awarded. The detailed list of injuries that entitle to compensation illustrates that the constructor of the insurance saw the insurance conditions more as a practical means of limiting the extension of the protection than as a method of achieving justice in the particular cases. The aim to avoid overcompensation in the cases that were found worthy of indemnification is also clear.

If we ask whether the similarities or the differences within the Swedish system are the most important, the answer obviously depends on whether we are looking for a system that is consistent in its attitude to the various problems of principle connected with the compensation for personal injuries, or for a system that exhibits original features in comparison with ordinary tort law. From the first point of view the differences within the system seem on the whole more important. The Swedish model is on the whole not a model but the product of a long development, in which various historical circumstances have played a role that could not be envisaged at any stage of the development. On the other hand, there is some unity in the fact that, in spite of differences of various kinds, the role of fault has consistently been reduced to a minimum. Another interesting feature is that this development has been influenced both by the legislature and by private parties, like insurers and trade unions, much less by the courts. From the second point of view it is as far as I know unusual that a system is based so strongly on pragmatic rather than ideological considerations. The objections to fault have largely been based on the costs of examining the whole of the behaviour of a person rather than being contented with some important facts, a view that is often justified when insurers rather than physical persons are involved.

### ***Extension of the insurance system?***

The features discussed now lead to the question whether the system that is most typically illustrated by the patient and pharmaceutical insurance can be extended to the compensation of other types of injury as well.

It is clear from the foregoing that in the present system there is an element of *compulsion* on those that finance the system, which is of a different kind than the compulsion to procure liability insurance that is inherent in the threat of having to pay damages. The compulsion is of different kinds, but except for traffic insurance it emanates from leaders of organisations in which membership is important for all who exercise a certain activity. The opinions of the individual members have little importance. For instance, it is not known what individual importers of pharmaceuticals think of the pharmaceutical insurance, but they have to follow the decisions of the leaders of their organisation. The fact that exceptionally even

parties that are not subject to this compulsion may subscribe to the insurance on a voluntary basis is no objection to the role of the compulsion as a whole.

It seems likely to me that this compulsion is essential for the successful working of the system. It eliminates the need for marketing expenditure, it excludes the possibility that mostly bad risks subscribe to the system whereas good risks avoid it, and it reduces the costs of administration considerably. The possibilities of keeping down the costs are intimately connected with this compulsion.

Professor Bo von Eyben, who is the leading expert on the “Nordic method” as a whole, mentions the fact that damages for personal injuries, and principally damages for non-pecuniary losses, are traditionally low in the Nordic countries in comparison with other Western countries. He finds in this circumstance an explanation of the success of the “Nordic model” in its countries of origin. I am not entirely convinced by his arguments. It seems likely to me that even with higher levels of compensation, at least the Swedish system would work. Probably the level of compensation is important in another way. The leaders of the organisations that now support the quasi-compulsive types could possibly not induce their members to accept the insurance, if adherence were more costly because of high amounts of compensation, and the advantages of a possibility of recovering huge amounts of money as damages were more conspicuous. However, it is hard to estimate the interaction of the various factors underlying the present system.

Assuming that compulsion of some kind is an important factor, we can raise the question whether such compulsion exists in fields other than those already subject to insurance of the special type. Damage to the environment has been suggested as a possible topic for “alternatives to damages”, but – even apart from the fact that the losses that are relevant as damage to the environment mostly derive from damage to property – it is hard to find in this field any of the facts that have been assumed here to facilitate insurance in favour of those who incur losses. There exists in Sweden a particular environmental damage insurance, but its function differs from that of the types that have been described here. It supplements liability for damage to the environment by covering losses that in principle entitle one to damages when such damages for various reasons cannot be recovered.

On the whole, I do not see any great possibility of extending the Swedish (or Nordic) model to types of personal injury other than those included in the present system. If this view is correct, it may seem a weakness of this model, as it means that practical circumstances rather than considerations of legal policy decide the protection of those suffering personal injury. All the same, the fact that it is impossible to extend a satisfactory system to all cases where it might be considered desirable on grounds of principle should not serve as an objection to employ it within the area within which it can work.

## **Influence on the Occurrence of Accidents and Claims**

*Prevention* is generally mentioned beside reparation of losses as one of the chief objectives of tort law. It has been considered a defect of the Swedish (or Nordic) model that it does not pay sufficient attention to this objective. However, when analysed further, the concept of prevention appears too elusive for a general

discussion. The law of torts and the substitutes for tort liability must be seen in a wider context. It seems a better approach to examine the system of compensation as a means of influencing the occurrence of accidents and of claims for compensation. Taking this more neutral view we are better equipped to discuss the role of the various principles.

The most important and most discussed issue concerns *motor traffic injuries*, and a pertinent question is to ask what measures society, or more specifically the State, in general undertakes in order to prevent accidents that lead to injuries. We find then that neither tort liability nor a system of indemnification on the Nordic model plays, or can be expected to play, any great role. The authorities that are responsible for road safety discuss the state of roads, speed limits, traffic lights, drivers' alcohol consumption, police activities etc., but the compensation system is, as far as I can see, not counted as an important factor from their point of view. In other words, deterrence is not regarded from a general point of view as an efficient or even appropriate means of prevention of injuries. However, even if the influence is minor, the possibility of such an influence cannot be omitted entirely when discussing a system of compensation for personal injuries.

From this point of view the question will be whether the Swedish system can be assumed to exercise more influence, positive or negative, on the occurrence of motor traffic accidents than a traditional system of tort law. Available statistics put Sweden in a favourable position as regards the occurrence of motor traffic accidents with serious consequences for personal safety. Of course a number of factors influence the events recorded by the statistics, and the fact cannot be taken as proof that the Swedish rules should have any favourable impact on the occurrence of accidents. But the statistics cannot be invoked in support of any presumption that the Swedish system of compensation as a whole has any unfavourable influence on motor traffic safety. If we try to survey the possible effects of the Swedish system, in the absence of empirical evidence – which would be difficult to find – it seems possible that the positive effects on traffic safety are at least as strong as the negative ones. In other words: the Swedish traffic insurance system might quite possibly lead to fewer accidents than the traditional tort system. The inclusion of the driver among those who are protected by the compulsory traffic insurance has been mentioned previously as an example.

The general assumption that the generosity towards persons suffering personal injury should lead to more persons letting themselves run the risk of such injuries appears to me unrealistic. More credibility can be afforded to special cases such as omission to use safety belts, and perhaps more important, travelling in a car with a driver who is visibly drunk. It is possible that knowledge of the fact that the compensation for an injury will be reduced can have an influence on the behaviour in such cases. Personally I do not believe it, but I cannot offer any substantial evidence in favour of my view. Anyhow, it is part of the evaluation underlying the Swedish model that considerations of reparation should prevail even if deterrence is likely to suffer.

If we try to imagine the effects of a system of compensation on the occurrence of motor traffic accidents, we soon find such a number of factors that can possibly have an influence that speculations appear futile for practical purposes. The rating system of motor traffic insurance is important, and of that system little is known.



Moreover, all important factors will probably affect not only the occurrence of accidents but the amount of motor traffic in general, and when such effects are taken into consideration we leave the region in which the law of compensation for personal injuries plays any role.

This general attitude does not carry any objection to the idea that for special types of accidents or injuries the conditions of liability may have a more direct influence, e.g. because that particular kind of loss is not covered by the insurance.

Altogether it seems impossible to me to form any general conclusions regarding the influence of such a system of compensation as the Swedish one on the occurrence of motor traffic accidents. We should beware of the mistake of assuming that, since the prevention of accidents is emphasized as a goal for tort liability in general, such a system as the Swedish one is inferior in this respect, without having any factual ground for such an assumption. A court of law or an insurer can, in possession of the details regarding an accident, form a judgement on special issues, but neither a legislator nor a legal scientist can make any realistic assumption of a general kind.

The position with regard to the *other types of insurance* discussed here is on the whole similar to that of motor traffic insurance, in so far as there are good reasons for assuming that the rules on compensation play only a minor role for the occurrence of accidents and that the same is true for the insurance replacing them. Although the chief aim of the insurance is to improve the situations of those suffering injuries, there is little reason to assume that the insurance has any material influence on the occurrence of injuries. Having established in the foregoing what kind of arguments I consider relevant, the separate kinds of insurance can be dealt with more briefly. We should always remember that as soon as we depart from the more obvious effects of the insurance, such as can be deduced from insurance conditions and similar sources we have to rely on speculations rather than facts.

As for the *Security insurance for occupational injuries*, the background is similar to that of motor traffic in so far as there is a strong regulation and supervision of working conditions. It is dubious whether the rules on compensation for injuries and diseases can have any practical influence on these conditions except in so far as all enterprises must consider the effects of these conditions on their insurance premiums. It would not surprise me if the insurance has an effect since according to the present Swedish practice premiums are decided principally on the number of insured employees in an enterprise, not on the working conditions nor on any experience rating. However, the insurers who operate in the field seem to have another opinion, since they have accepted a flat rate system. The reason may on the other hand be simply that a flat rate system reduces rating costs. However, here once more it can be objected that in the lack of empirical evidence, all assumptions regarding the effects of the insurance on the occurring of accidents is pure speculation.

As for special cases, the insurance conditions for the security insurance do not contain any exception for gross negligence or any similar conduct by the employer; such an exception would in practice operate to the disadvantage of the injured party and is therefore excluded.

It is possible that adding compensation for pain and suffering – which as mentioned is the principal part of the indemnities that correspond to tort damages –

may contribute to the general effect of the changes in the security insurance. In other words, the possibility of being entitled to compensation for pain and suffering might encourage an employee to claim indemnification for losses caused by events which lie on the borderline of what is to be considered as an occupational injury. The effect of the rules would in such a case appear more in the behaviour of the employees than in that of the employers. Here, however, we enter the field of pure speculation.

It is also possible that the security insurance may have an influence on the injured person's behaviour, not so much with regard to his or her exposing him- or herself to unnecessary risks as with regard to the propensity of raising claims for pain and suffering or similar consequences. A possible example would be a claim based on the injurious effects of the general occupational environment to which the claimant has been exposed. In the absence of empirical evidence it would be pure speculation to express any opinion on such a question.

The *patient insurance* and the *pharmaceutical insurance* can be discussed with greater hopes for certainty than the two types mentioned previously, because they cover much smaller fields and, in comparison with occupational injuries insurance, are less involved with social insurance.

The possibility of these branches of insurance exercising an influence on the occurrence of accidents cannot be considered important. There is a strict supervision by public authorities, and the incitements for exercising care are, apart both from the supervision and the principles for indemnifying injuries, strong in both fields. Much will of course depend on the insurance conditions, which cannot be examined in detail here. With regard to the possibility of employing rules of compensation for influencing the behaviour of parties concerned, it is possible that the insurance conditions might be improved in details in order to encourage care against the occurrence of accidents. It is, however, hard to imagine that the general features of either patient or pharmaceutical insurance will reduce the carefulness of hospitals, doctors in private practice, producers and importers of pharmaceutical drugs to any considerable extent.

These considerations do not in my opinion lead to any certain or nearly certain conclusions.. It cannot be regarded as more than an unsettled question whether the Swedish model influences the occurrence of personal injuries any more than traditional tort liability does. The view that this model neglects deterrence seems to be based on an unjustified assumption regarding the mutual effects of reparation and prevention of accidents. The fact that reparation is the main concern of the Swedish model says nothing about impact on the occurrence of personal injuries. The fact that legislators, courts and legal writers maintain that an important object of tort liability is to prevent accidents and injuries does not provide any basis for an opinion of a system that has no such overt object. It is thus possible that the Swedish model works as well as, or even better than, traditional tort liability from the point of view of prevention. As far as I can see there is no empirical evidence available regarding the comparative merits of either system for the prevention of accidents. As far as I should venture a guess I believe that insurance conditions, the rating system and similar circumstances are more influential than the details of the rules on compensation.

The general attitude that I have presented leads to another question that cannot be discussed without going into great detail. Is it possible to amend the present Swedish system in a way that will favour deterrence, without losing the advantages that constitute the reasons for introducing the insurance model? Looking at the system as a whole, the possibility seems remote, since it runs counter to the basic ideas of the Swedish system. As for details there is no doubt much scope for amendment, as has appeared before in the discussion of details. On the other hand, if a system functions satisfactorily for the purposes for which it is intended; why change it in order to achieve some other aims?

### ***Other Considerations***

Reparation and the prevention of accidents are generally regarded as the chief objects of a system of compensation for personal injuries. To these can be added others that can be considered secondary.

One such object is furthering *social objectives*, taking particular concern of those who are threatened by inability to obtain medical rehabilitation or by serious deterioration of their economic status as the result of personal injuries. This can be considered a special angle, or perhaps an extension, of the reparative function. There can hardly be any doubt as to the fact that such social considerations have had a great impact on the Swedish rules regarding compensation. This is true even if we look at the system of tort law as a whole and include the statutory rules found in the Tort Damages Act. The rules regarding *contributory negligence* of a person suffering personal injury have been mentioned several times. The motor traffic insurance has been characterised both in the *travaux préparatoires* and in Supreme Court decisions as being quasi-social insurance in character. Even if this is an exaggeration, it has some basis in the lenient attitude taken to admittedly blameworthy conduct of a person suffering injury from motor traffic.

In the other branches of insurance that are discussed here a strong element of social considerations can also be found, but not consistently. It is strong in security insurance for occupational injuries – which can almost be regarded as an extension of the public occupational injuries insurance – but less strong in patient insurance and pharmaceutical insurance.

Considerations of *economic efficiency* are sometimes found in the *travaux préparatoires* of various statutes, but they do not seem to play any major role. They rather serve as window dressing when proposals are made for the introduction of principles that have their true basis in more pragmatic considerations. On the other hand, it is stressed, particularly with regard to patient insurance, that competition should be left as free as possible, for the advantage both of those suffering injuries and for those paying premiums.

Generally speaking the same argument can be made with regard to economic efficiency as was done previously with regard to the occurrence of accidents. The fact that legislators, courts and legal writers argue that tort liability fulfils a certain function cannot be taken as proof of either the inferiority or superiority of any other system of reparation in this particular respect.

Considerations of justice, in the sense of treating the side of those suffering injury and the side of the party causing injury alike, play little role in the Swedish system. A sufficient explanation can be found in the fact that the position of a private person suffering injury can rarely be compared to that of an insurer who represents a body of those that cause injuries.

## **Conclusions**

It has been argued here that the Swedish system of compensation for personal injuries, when examined closely, is found to consist of a mixture of elements of various kinds. We can find some basic features common to the whole system, many of them concerned more with legal technique than with principles of legal policy. Comparatively few of these features concern principles, and they furnish only part of the reasons for the various types of compensation. These principles include the rejection of *culpa* as the paramount basis of the right to compensation on the tort law level. This rejection is based on the conviction that there is no strong connection between the occurrence of *culpa* on the side of a party causing an injury to person and that person's right to an indemnity from an insurance fund. Other features that are found in the present system can be explained or justified on more pragmatic grounds.

The evaluation of a model like the Swedish one must depend on a number of different circumstances. Those that regard the law of tort as the positive form of a principle of morality cannot be satisfied with the Swedish model. Nor can those who regard the maintenance of time-honoured principles of tort law as more important than trying to satisfy the practical needs of today. Those who regard the prevention of injuries to persons as an important objective of a system of compensation and for that reason object to the Swedish model should, in my opinion, take a second look at the various types of compensation at present found in Sweden and reflect on their possible influence.

There are a great number of other problems that must be considered when evaluating systems of compensation of personal injuries, including the Swedish one. The short study presented here does not aspire to more than drawing attention to the most important ones and their foundation in fact. In my opinion, the Swedish model, whatever one may think of its practical advantages and disadvantages, makes us reflect on a number of questions whose problematical character might otherwise escape us. The importance of this aspect deserves to be emphasised as a conclusion of this study.