Collectivization of Tort Law
Satire, Elegy, Idyll and Realism

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1 Introduction

The task of tort law is to place the victim back in the same situation as he was before the injury or damage occurred. The principle is that the *compensation* rendered must be *full*. Other compensation systems might strive in the same direction, but neither *has* nor *could* have the same ambition. Compensation from social insurance can only cover part of the total personal injury costs. Nor can private insurance generally apply the principle of full compensation; standardisation and excess are necessary to avoid the insurance becoming too expensive. Certainly, other compensation systems[1] might as a principle be based on tort law regarding the amount of compensation.[2] Yet due to restrictions of mainly the same kind as in private insurance, also these systems are unable to reach the same level as under tort law.

The aim and direction towards one hundred per cent compensation makes the tort law system the most individualistic one of all. Surrounded by collectively built compensation schemes, tort law attains a *special profile*. This part of the law gives human beings their last remedy for protection of their own interests.

In its meeting with the collective world, however, tort law is placed in a *contradictory* situation. The collective systems are based on simplicity and low transaction costs. Tort law is complicated and entails comparatively high transaction costs. Collectivism is based on a regard for the many people that are covered by the system. Tort law is traditionally only an issue between two free individuals, the tortfeasor and the victim.

The growth and continuing expansion of the collective compensation schemes has been necessary for modern society. At the same time the rules of a pure tort law system revealed a serious *weakness*. Alone, tort law is not enough for the victim. In this situation the system has had to accommodate itself to the circumstances.

The adaptation at issue has taken place in different ways and to varying extents all over the world. No form of international unity could be reached. To the extent that there are collective schemes surrounding the tort law rules, one can however talk about a *collective* tort law. Next to this stands a tort law where the collective idea is not brought to the fore**,** an *individual* tort law. However, this kind of tort law is rare. Even if there is no social insurance, private insurance or any other compensation system, already a discussion about the *possibility* of having taken an insurance in the particular case is enough to change the picture from individual tort law to a collective tort law.

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1 *See* for example the three Swedish liability insurances: Industrial injury insurance, patient insurance and drug insurance. The first one (“Trygghetsförsäkring vid arbetsskada, TFA”), built on a collective agreement, covers work injuries. *See* Oldertz, Carl, *The Patient, Pharmaceutical and Security Insurance*, in: Compensation for Personal Injury in Sweden and other Countries, C. Oldertz, & E. Tidefelt, eds., Stockholm 1988, p. 51. An obligation to sign the patient insurance, imposed on public and private care providers, is prescribed in the Patient Injuries Act (”patientskadelagen (1996:799)”). *See* Oldertz, *op. cit.* and, with further references, Dufwa, Bill W., *The Swedish Model of Personal Injury Compensation Law Reconsidered*, in: European Tort Law, Liber amicorum for Helmut Koziol, eds. U. Magnus & J. Spier, 2000, p. 109, 117-119. About drug insurance, *see* Oldertz, *op. cit.*

2 *See* No. 41 *infra*.

When the relation between a system of rules and reality fail to tally, one could say, in terms drawn from the history of literature, that there are four possible reactions or ways to behave. The system is criticized (satire, see 2 below). Sadness is expressed for what has been lost (elegy, see 3 below). The whole problem is ignored (idyll, se 4 below). The new situation is accepted and worked on (realism, see 5 below).

2 Satire

It was satire that hit tort law to a *high degree* in the 20th century, although the criticism against the tort law system had appeared already in the 19th century.[3] In the light of the scanty rules on tort liability contained in the *Code civil*, a severe criticism developed against the existing law in Belgium and France.[4] In the 20th century, the number of satirists increased. Particularly towards the middle of the century, they probably even formed the majority view. They scoffed on remarks of all kind against tort law. It was easy, because the goal was open: Tort law's weak anchoring in reality was in many respects totally obvious. The fight was not always fought with clean weapons. Those who underlined the positive values of tort law sometimes became the subject of condescending remarks by their opponents.

Particularly in the middle of the 20th century, many satirists wanted to solve the problem by *abolishing* essential parts of *tort law* in favour of the collectivistic idea. The distance between rules and reality was considered too great. The day is decided for everyone, and this truth was supposed to be valid also as far as tort law is concerned. Such a development was also discussed by the legislator.

In 1949, *Ivar Strahl*, professor of criminal law, received the charge of the Swedish government to write up a preparatory report regarding the need for legislation in the field of tort law. Strahl´s work resulted in a document, published in 1950,[5] that has also been called a report of principle. Strahl proposed that personal injury damages to a large extent should be abandoned and replaced by a broad insurance system. According to Strahl, the idea was more difficult to realize concerning property damage, but future legislative work should in any event aim for that direction.

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3 *See* Viney, Geneviève, *Introduction à la responsabilité*, in Traité de droit civil sous la direction de J. Ghestin, 2nd ed., Paris 1995, p. 82-83.

4 *See* in particular a famous article of Sauzet, M.: *De la responsabilité des patrons vis-à-vis des ouvriers dans les accidents industriels*, Revue critique de législation et de jurisprudence (Bruxelles) 1983. *See* also Sainctelette, C. , *De la responsabilité et de la garantie (accidents de transport et de travail)*, Bruxelles 1884. *Cf.* Viney, *op. cit.* p. 82-84.

5 *Förberedande utredning angående lagstiftning på skadeståndsrättens område* (SOU 1950:16) by Strahl. I., Stockholm 1950.

The report became a novelty unto the world,[6] and has been regarded as epoch-making by the Swedish doctrine.[7] Strahl´s achievement is still discussed all over the world. The legislative work preceding the *Swedish Damages Act of 1972* became heavily influenced by Strahl's ideas.[8] In the governmental bill,[9] a system for the future was developed, where the importance of damages for injuries would be replaced by insurance; such progress was also expected to a certain extent regarding property damage.

As far as is known, when the new Act was adopted in 1971, no legislator in the world had succeeded so well in analyzing the existing dilemma of tort law as the Swedish legislature. The *travaux préparatoires* was just one single brilliant display in this regard. True, it was original to introduce rules on tort liability in a new Act at the same time as this law was severely criticized in its motives, but it was nevertheless understandable in view of Strahl´s report, whose main idea was never realized but that nevertheless to a large extent became the source of inspiration. The *insurance issues* are there throughout the whole *travaux préparatoires*. And the old rules were partly changed in a most sensational way.

The *international attack* on tort law, above all expressed in the famous book of P.S. Atiyah called Accidents, Compensation and the Law,[10] took its point of departure in the fault rule. The satire underlined its random result and the uncertainty that followed. Another main point of the criticism was the comparatively heavy transaction costs that were a part of the system. The fault rule was said to lack the social element. It did not regard the capacity to pay of the tortfeasor, not the need for compensation of the victim. Particularly criticised were the rules on contributory negligence which could lead to harsh results for the victim. Another part of the criticism was that the fault rule was without nuances. It never considered the degree of culpability on one side, the size of the damage or injury on the other. "A trifling negligence of an air traffic leader could result in losses of many millions, while a death maltreatment maybe did not lead to liability for more than the funeral costs."[11]

In the international - and especially the French - debate, we find another kind of critique, where the *morality* of calling an act or an omission as "negligent" was called into question. According to these writers, trifling acts and omissions

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6 Strahl himself presented his ideas in an international forum through the article *Tort Liability and Insurance*, Scandinavian Studies in Law 1959 p. 199. His presentation was to some extent preceded by the Danish law professor Henry Ussing, in the article *The Scandinavian Law of Torts. Impact of Insurance on Tort Law*, American Journal of Comparative Law 1952, p. 359. It has been said that the ideas of Strahl influenced Albert Ehrenzweig in his work *'Full Aid' Insurance for the Traffic Victim*, Berkeley & Los Angeles 1954.

7 *See* Bengtsson, Bertil & Strömbäck, Erland, *Skadeståndslagen. En kommentar*, Stockholm 2002, p. 16.

8 For more information on the work of Strahl and its further development, *see* Dufwa, Bill W., *Personal injury compensation in Sweden*, in: Personal injury compensation in Europe, eds. M. Bona & P. Mead. Deventer 2003, p. 460-462.

9 Skadeståndslag m.m. Kungl. Maj:ts proposition 1972:5. Stockholm 1972.

10 1st ed., London 1970. Later, new editions appeared, and from 1987 the book has been edited by Peter Cane.

11 Citation of the Swedish government in their bill Skadeståndslag m.m. (*see supra*, note 9) p. 85.

could also be considered to be negligent.[12] In this way, the concept of negligence came to be deformed. It was said that a distinction ought to be drawn between fault ("faute") and mistakes ("erreurs").[13] Only faults were worthy of the sanction of damages.

The reaction against artificiality is as furious as the abhorrence of affected manners that was criticized by the philosophers during the Age of Enlightenment. The difference, however, is that the artificiality of law does not necessarily need to be considered as reprehensible. To the contrary, since the artificiality might lead to the consequence that compensation is paid out from a liability insurance, it might be considered to be of considerable value in many situations. The alternative might be to adopt strict liability. But there are courts in the world to whom this is not permitted, or where this way of developing tort law proves a difficult step. And, on the whole, it might be better with an unnatural negligence than with no compensation at all.

By contrast with inexorable satirists who want to abolish tort law altogether, there are those with a more *constructive attitude*. Coming changes of tort law are accepted. The new creature, still a tort law, is praised:

"It will be a great day for tort law and its function in society when the burden of processing relatively routine claims for unintended physical injuries are removed from the courts and treated as a part of the larger social problem resulting from accident and sickness, with social insurance. The very best part of tort law will remain. A great need for lawyering skills will remain, (…). So the answer, Virginia (and all your friends who are planning to study law twenty, forty or sixty years from now), is that yes, there is and will always be a law of torts. …"[14]

3 Elegy

It is not easy to find direct expressions of *sadness* in legal literature following the loss of individual tort law. However, it is not impossible; regret following the loss might be woven into a criticism of collective tort law.

When an author underlines the *intellectual fascination* that tort law has presented human beings over time, one might have the feeling that this could reflect some kind of melancholy for what has been lost. The same may be successfully argued when an author praises the capacity of *old concepts* such as fault and the distinction between injury and sickness, and their capacity to survive.

When the writer of tort law discusses parts of tort law that up until now have not immediately been connected with a collective approach - for example personality rights and human rights - he might be said to make a melancholy remark when he says: here the *"real tort law"* will be found in the future.

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12 Patrice Jourdain talks about a "deformation of the notion of fault", *see* his book *Les principes de la responsabilité civile*, 6th ed., Paris 2003, p. 16.

13 This was a leading idea of André Tunc.

14 Pedrick, W. H., *Does Tort Law have a Future?* Ohio State Law Journal vol. 39 (1978) p. 790.

4 Idyll

There are tort law scholars who simply *neglect the collective approach* altogether. The insurance aspect might be completely put aside. This way of working might continue in their new writings, even if they are criticized due to their approach. Such writers seem rare today. What they do, is to apply individual tort law. Many good things may result from their work. But even better things still if they had applied the collective approach.

5 Realism

5.1 The Overall Picture

It is not difficult to see the position of tort law today. The ready laid rich table of tort law has continued to be developed with acumen and elegance. But over the head of the system builder hangs the *sword of Damocles*, held only by a horsehair straw. This sword, that might at least partially obliterate tort law, represents the collective compensation systems.[15] In order to survive, tort law**,** not least the part of it treating personal injury compensation,[16] has to adapt itself. There is no third alternative. The realistic view simply takes this threat seriously.

Tort law forms only *one part* of the whole system of compensation law. This was underlined and made quite clear to an international public by the Pearson Committee in its report, published in 1978.[17] And it is this very whole picture that has to be respected.[18]

Tort law must therefore be *fused* with the other systems of compensation in a harmonistic way. This work depends to a large extent on the kind of damages in question. Personal injury compensation demands the consideration of a great number of systems. One has to pay regard to social insurance, private insurance and special compensation systems. Even the rules of contract law might come into consideration. All systems except social insurance are normally brought to

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15 *Cf.* Jourdain, *op cit.*, p. 20-24 (“Les mécanismes nouveaux d´indemnisation collective apparus à la suite de l´industrialisation des activités sont venus concurrencer la responsabilité civile dans sa fonction d´indemnisation et menacent sérieusement son avenir ”, p. 16).

16 Many opponents of tort law regarding personal injuries mean that the survival of this part of tort law cannot be found in any virtue of the system. Yet in other circumstances, as for example the incidence of political power and the public debate, so Ison, T. G., *The Politics of Reform in Personal Injury Compensation* (1977) 27 University of Toronto Law Journal, p. 385 (“The most basic problems result not from the fault principle but from the use of any liability system at all”, p. 387.)

17 Royal Commission on Civil Liability and Compensation for Personal Injury. Report. Vol 1-3, London 1978, passim (”Our compensation systems should be looked at as a whole”, p. 367)

18 *Cf.* Royal Commission on Civil Liability and Compensation for Personal Injury. Report. Vol. 2, London 1978, p. 66 (”More generally, it is suggested that there is a need for a more effective co-ordination of compensation systems.”).

the fore concerning property damage, to a much lesser extent regarding pure economic loss.

Besides the application of the fault rule, what above all have made lawyers turn their attention to the collective compensation systems, are the *transaction costs*. Trials have been considered to be too expensive for both the parties involved and society at large. Other procedures might prove cheaper. Tort and insurance issues could be decided by experts. Mediation and negotiations tending to a settlement could also provide alternatives. Ombudsmen and trade organizations might be at the disposal of the parties. Special complaint boards treating the disputes could also be given the power to decide the questions.

Of all the countries in Europe, it is Sweden that has most consequently embraced the system involving *complaint boards*. Tort and insurance contract law are being developed to a considerable extent by these boards**,** which often apply collective compensation schemes, set up by law or voluntarily. One might find it disquieting to hear of the courts being left out of such a central part of private law so often and to such a high degree.[19] But in the few cases where compensation has been driven further to the courts, the practice of the boards has generally been respected. On the whole, the advantages are greater than the drawbacks. And to the advantages belongs not least that the procedure of the boards in principle is free for the victims.

An especially important factor is the capacity of the boards to create uniformity in the law. This is particularly true as regards non-economic damage. The difficulties in finding objective grounds for measuring the loss caused by the damage are evident here. The damages are *standardized* in the judicial application. The alternative of complaint boards working in close contact with insurers has been considered to promote this development, involving a simplification of claims regulation.

The frequent use of complaint boards in Sweden is totally in harmony with the current development in Europe. Trying to find *alternatives* to the court system aimed at promoting consumer access to new dispute resolution channels is a clear headline in the Commission's endeavours. In April 2001, a Communication[20] was presented, where the idea was to find "simple, swift, effective and inexpensive"[21] alternatives. According to the Commission, if consumers are to utilise these opportunities, their direct sustained participation must be guaranteed. Already in 1998 the commission referred to seven principles: independence, transparency, adversarial principle, effectiveness, legality, liberty and representation.[22] The alternatives will operate side by side with the courts. This is necessary.[23] The Convention for the Protection of Human

19 *Cf.* Regeringens proposition 2000/01:68, *Ersättning för ideell skada*, Stockholm 2002, p. 61.

20 Communication on "widening consumer access to alternative dispute resolution". Com (2001) 161 final. p. 2.

21 Communication on the "out-of-court settlement of consumer disputes". Com (1998) 198 final.

22 *Cf.* Communication of 2001 (*supra*, note 20) p. 4.

23 However, a complaint board might be treated as a court if it has the same features as this one.

Rights and Fundamental Freedoms guarantees everyone a fair and public hearing "by an independent and impartial tribunal established by law".[24]

To manage modern tort law, an *insurance perspective* is required. The system builder cannot escape this. There is a tortfeasor and there is a victim. Both of them might have taken insurance or might have had the possibility of taking one. The difference between the tortfeasor´s insurance- a liability insurance- and the one taken by the victim, is enormous. Two completely different compensation systems stand against each other. One of them is based on liability, the other on a more or less automatic compensation system. The object is to find the right balance between the two, and to make a judgment on what the best insurance situation ought to be, with the point of departure in a social evaluation. The system might be easier to adapt for certain injuries and damages than for others. The final apportionment between the two systems might be the most important thing. Here there might be mandatory rules, although normally they are optional. When the rules are non-obligatory, contracts signed by the insurers might exist aiming at prohibition of recourse actions between them. When the tort law issue is decided, even the reinsurance situation ought to enter into the picture. Mastering the overall picture provides better opportunities to control also the details, as opposed to when you are restricted to one sole issue.

Consequently performed realism requires every question to be regarded from an insurance perspective. Certainly, notions of tort law might be conceived as *perverted* by insurance practice.[25] But this is something we have to live with. We have to go on, even if on a weak basis. Life is, in the words of Samuel Beckett, to draw sufficient conclusions from insufficient prerequisites.

So it must be considered unrealistic to *leave out* compensation from social insurance and private insurance, when the size of damages concerning injuries is discussed. It might even be necessary to treat causation issues with regard to existing insurances and the possibilities of taking insurance. The same applies as regards the question of mitigation of damages. The recourse action of insurers must also be taken into consideration. It is hardly enough in a legal text-book to try to cover up omissions of the insurance perspective in the following book by only having a general overview of tort law and insurance as an introduction. Maybe the best way for the author of a text-book is to uninterruptedly ask if tort law really is the most accurate solution in the given context.[26]

The insurance perspective becomes particularly difficult to treat in a *comparative view*. When, for example, rules are established concerning the importance of social insurance, the task becomes difficult, since one enters fields that are specific for the different states. Groups working in Europe today trying to establish general principles of a European tort law face a great challenge here.

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24 Article 6 Section 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11.

25 *See* Markesinis, Basil, *La perversion des notions de responsabilité civile délictuelle par la pratique de l´assurance*, Revue international de droit comparé 1983 p. 301.

26 *Cf.* Markesinis and Deakin´s *Tort Law*, 5th ed. by Deakin, Simon, Johnston, Angus & Markesinis, Basil, Oxford 2003, p. 62 ("The reader of tort textbooks should thus not content himself or herself with the critics of individual decisions but should question constantly the suitability of tort as a means of compensating injuries.").

Collective national tort law must however also be able to be transformed into a European level. It is hard to understand why modern tort law, collective on a national level, all of a sudden has to be individual when it comes to viewing Europe on the whole. Such a way of working would represent a step backwards. One can also argue that collective tort law becomes particularly easy to manage at an international level, considering the idea that everything on this level is new: A house without walls and ceilings is easier to work with than when you are surrounded by all of the national state's limitations. These groups must therefore also pay respect to the insurance perspective.

Tort law has successively undergone changes that facilitate the realization of the insurance perspective. Nowadays, one is willing to see the tort law issue both from the *tortfeasor´s* point of view and from the *victim´s* standpoint. The traditional point of view was to see everything from the tortfeasor´s perspective. One of the first lawyers to react to this simplified attitude was the French legal scholar Boris Starck. In his thesis from 1947,[27] Starck vigorously criticized the traditional view and came to the victim´s rescue. He underlined the victim´s need for compensation by means of a contractual view. According to him, the damages also ought to be a guarantee. This idea came to explode the then state of affairs in French tort law. It was around the doctrine of Starck that André Tunc let his ideas flourish,[28] and with him also Geneviève Viney, the great French authority of today in the field of French and European tort law. The process of change has taken place. In modern tort law, it is evident to analyze the question from the perspectives of the tortfeasor as well as of the victim and this is in the nature of things; he or she who is of the opinion of having found something new and original by presenting the double perspective today risks making a fool of him or herself.

However, it is *not* enough to see the tort law rules in the way that the realization of the collective tort law is only facilitated. The insurance perspective demands more.

5.2 Internal and External Collectivization

5.2.1 Introduction

Collective tort law has two shapes. The most well known one, and the one normally aimed at when talking about collectivization, sees the rules developed in a collective direction within their own field. One can here talk about an *internal* collectivization. An example is the broadening of enterprise liability. Another example is the tendency to impose liability on an ever-increasing number of subjects for one injury or damage. A third example is the one that perhaps has attracted most importance: the rules are influenced by the existence of insurance and by the possibilities of taking insurance .

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27 Starck, Boris, *Essai d´une théorie générale de la responsabilité civile considérée en sa double fonction de garantie et de peine privée*. Paris 1947.

28 *See* the survey of Tunc´s work in: Viney, *supra* note 2, p. 90-93.

The second variant of collective tort law sees the rules leaving their original place in tort law and shifting to the collective field. This is a question of *external* collectivisation. Tort law rules are used in a special compensation system. The latter lives it own life, but tort law rules are applied here and there. In the Swedish patient insurance, for example, tort law rules are *inter alia* used concerning the amount of damages.

5.2.2 Internal Collectivization

There are many articles of the Swedish *Damages Act* from 1976 that express the internal collectivization. The perhaps most far-reaching one is the regulation found in Chapter 3, Section 6. According to this provision the liability of the employer regarding property damage caused by fault of his employee might be mitigated "if this is deemed reasonable on account of existing insurance coverage or possibilities to obtain such coverage."[29] Behind this rule was the idea that property damage to the largest possible extent should be covered by, and stay on, the voluntary insurance taken by the victim.

This boldness of conception could have been realized by a general limitation of this insurer's right of subrogation. But such a rule had proved difficult to include already when the Damages Act was in the process of being created. Chapter 3, Section 6 was adopted instead. According to the guidelines developed in the *travaux préparatoires* of the Act, it is true that the insurers have a full right to subrogation against liability insurance; so far there is no change. But to the extent that tort liability goes further than what is covered by the liability insurance (because of restrictions in the conditions of insurance), the insurers do not have a right of recourse. According to the guidelines, one should treat victims that had forgotten to take a normal property insurance in the same way as insurers exercising their right of recourse actions .[30]

An example of internal collectivization made by *courts* is the following, as taken from Swedish jurisprudence: A plumber (B) without employees had promised a villa owner that he would install piping in his garden. To be able to do this, B hired from an enterprise (A) an excavator with a drill (C). Who was the employer of C?[31]

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29 The rule also applies to the liability of the state or the municipality regarding property damage caused by fault in exercising public authority,

30 An example is provided in the following: Suppose that a boat is damaged, owned by a private person and worth 500.000 euros. Since this owner is not regarded as a normal consumer (the boat is worth too much), he ought to have taken an insurance covering the damages that might happen to the boat. If an employee negligently burns the boat down whilst repairing the damage and the employer had no liability insurance, the owner might have a reduction of the damages that the employer has to pay. It is not even excluded that he might be completely without damages. All depends in this case as in others on the circumstances, not least on the economy of the employer; big businessmen – as for example a municipality – might in general be more charged than small enterprisers. *Cf.* Bengtsson & Strömbäck, *supra* note 7, p. 109.

31 NJA 1979 s. 773.

The Supreme Court interpreted the motives of the Damages Act in such a way that the liability of an employer ought not to be shifted from the original employer where the lending was of a fairly insignificant duration and was done in favour of an enterprise that in its activity did not keep own employees busy.[32] The court also referred to clear statements made by the legislator when the employer's liability was adopted. According to these, an unbiased balancing of the employer's and the victim's respective positions and interests normally rendered the result that the employer was closer to carrying the economic consequences than the victim. What is more, the employer had in any event a possibility to protect himself by taking out liability insurance. He could also let his cost calculations cover the premiums and thereby wholly or partially transfer these costs to a greater collective. According to the court, the possibility of insurance and of calculating the premiums in the costs of the whole activity was a point of view that in a natural way could be applied on the lender in this case. In relation to B, this point of view was, according to the court, "reasonably far-fetched and unpractical". The employer's liability was considered to have remained with A.

5.2.3 External Collectivization

When a new compensation system is created, rules concerning the conditions for payment of compensation and the amount of money are brought to the fore. In both these regards, tort law places rules at the disposal of the new system.

Causality issues are one type of *condition* for payment of compensation. The notion of injury or damage also belongs to this type of rule. In reality, the system builder is free to pick and choose. If he prefers tort law rules, a simplification arises, and the result could be that the tort law rules are applied in the same way in two fields. But this is only the case if no reservation has been made when the rules were being transferred, and where the purpose was that there should be a correspondence.

A reservation might imply that the *application* of the tort law rule can differ in one regard or another. But even if such a reservation is not made, it is possible that the tort law rules of the new system of compensation in reality might be applied in another way than is usual in tort law. The surroundings might prove infectious, and the tort law rules in their new milieu may be subject to a collectivization that has no correspondence outside of the system. In the Swedish Traffic Accident Act from 1976 - where a no-fault system was adopted - "causality" is supposed to be understood as it is in tort law. But it might well be that this concept receives a special meaning in its new environment. If this is the case, "causality" can certainly not be the same as under general tort law. Consequently, one cannot simply pick up tort law rules used in special

32 According to the motives of the Damages Act, the question should firstly be decided with the point of departure in a judgment concerning which of A or B most closely exercised the control of the employee and who led the work. However, this guideline was not valid in all cases of lending labour, *only* in such cases where the employee factually had been incorporated into the activity of the other enterprise in a way that he or she outwards is considered to be wholly on an equal footing with the actual employees of this enterprise.

compensation systems and presuppose that they are the same as in tort law; they cannot just be transferred to general tort law.

The question now discussed is important and ought to be analyzed in more detail. Normally it is taken for granted that the application of a tort law rule in a special compensation system can also be used outside the system. Inversely, the same applies. General tort law rules are supposed to be used within the special system, although the system is built up in such a way that such transfers are not suitable as far as all the details are concerned. The issue seems to be neglected in the national and international debate. The analysis of collective tort law has to pay attention to problems of this kind.

When introducing a new compensation system, tort law rules might also be used concerning the *amount of damages.* As made clear in the introduction, it is a principle of tort law that the compensation shall be full. This might be a result which the new system wants to escape. If so, the tort law rules in this regard will be dropped.

However, the system builder of the new compensation system may *not* want to cut down the amount to be paid out. That may all depend on the circumstances of the given case. If the aim of the new compensation is that it shall be exclusive - meaning that tort law is abolished - the builder can decide what he wants as far as is possible in the given society. But if the meaning is that tort law shall be applied alongside the new system, there is a danger to cutting down the amounts that are going to be paid out from the scheme. The victim might go to court to try to get full compensation. In such a case, the transaction costs will increase again. The normal solution chosen in Swedish law is therefore that the special scheme, except for deductibles and restrictions, allows full compensation. Here, a desire to go to a court is considerably diminished.

External collectivization is very *common* in Sweden. Although a result of the criticism against tort law, traffic insurance, industrial injury insurance, patient insurance, drug insurance and even the criminal compensation system work with tort law rules in as far as this has been considered to be appropriate.

6 Concluding Remarks

Modern tort law is to a great extent a *collective* tort law. It is surrounded by collective schemes and is influenced by these. There are, however, still parts of tort law where collectivization is not brought to the fore. Here an *individual* tort law is applied. Such a liability is however uncommon. Even a discussion about the *possibility* of having taken an insurance in a particular case is sufficient to make the picture change from indivudual tort law to collective tort law.

The legal policy of tort law has long been thoroughly discussed, all over the world. However, not much has still been done to *clarify* the relationship between tort law and the collective schemes. It is easy to say that the existence of insurances or the possibilities to take insurances might influence tort law. But to know exactly where and why is more difficult, requiring a broad and deep analysis, where all kind of considerations- dogmatic, economic, actuarial technique, legal ethics and social values- are brought to the fore.

Attention must be paid to the difference between internal and external collectivization. The *internal* collectivization takes place when the rules are changed in a collective direction within their own field. The most famous example of this is where the rules become influenced by the existence of insurances. *External* collectivization means that tort law is transformed into compensation schemes. Here it is used to fill up notions that are also used in the collective scheme, for example causality, damage or damages.

External collectivization might result in an application of the tort law rules that does not correspond with their application outside the scheme. If the application of tort law rules within the scheme in spite of this are also used outside the scheme, the result might not be well founded. The whole of tort law might become *deformed*. For instance, it is not certain that the way in which the concept of causality is used in a special traffic accident compensation system should also be used in tort law outside this system.

The perhaps most important task in the research of tort law today is to analyze the principles and effects of external collective tort law. This is particularly important if *new* consumer oriented *dispute resolution channels* arise as the Commission hopes (see *supra* sec 5.1), and if these systems use collective insurance compensation schemes where tort law rules are applied.