

Tort and Insurance Law

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Compensation for Personal Injury
in a Comparative Perspective

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SWEDEN

Bill W. Dufwa

Part I. General Questions

I. Interplay between Tort Law and Social Security Law

A. The Swedish model

- 1 During the second half of the 20th century Swedish tort law suffered a change that was sweeping and put it in a class by itself in Europe. The development can be said to have had a peak in the personal injury field where the social approach was stressed. Slowly but surely Swedish tort law ended in the domain of compensation law where *le cri du cœur* is “*Haftungsverdrängung durch Versicherungsschutz*” (“Liability repression through insurance protection”).¹ The right to compensation according to tort law came to be an expression of deeply lying values of the Swedish society. There were clear political elements in this development. However, the activity of the scholars became the heaviest contribution to it. Without them the development would probably never have taken the orientation it did. Many excellent scholars were involved in creating something that has been called “the Swedish model” in the compensation field.
- 2 The first one was *Ivar Strahl*, a professor of penalty law, who in a radical, original and world-famous bill in 1951² treated tort law in quite another way

¹ See J. Hellner, *Haftungersetzung durch Versicherungsschutz in Schweden*, in J. Fleming/J. Hellner/E. von Hippel, *Haftungersetzung durch Versicherungsschutz* (1980), pp. 24 *et seq.* See also *idem*, *Compensation for Personal Injuries. The Swedish Alternative*, [1986] *The American Journal of Comparative Law*, 613-633; *idem*, *The Swedish Alternative in an International Perspective*, in C. Oldertz/E. Tidfelt (eds.), *Compensation for Personal Injury in Sweden and other Countries* (1988), pp. 17-39, especially 37. See also B. W. Dufwa, *The Swedish Model of Personal Injury Compensation Law Reconsidered*, in U. Magnus/J. Spier (eds.) *Liber Amicorum for Helmut Koziol* (2001), pp. 109-142, especially 109-110 and *idem*, *Development of International Tort Law till the Beginning of the 1990s from a Scandinavian Point of View*, *Scandinavian Studies in Law vol. 41* (2001), pp. 87-182. See also *Alternative Compensation Mechanisms for Damages. The Nordic Countries. Common Report and National Reports, World Congress New York 22.-25. October 2002*, pp. 151-191. A German lawyer has recently published a study on the Swedish system: B. FASTERLING, *Die Abstimmung des Schadensersatzes mit dem Schadensausgleich bei Personenschäden am Beispiel der Rechte Schwedens und Dänemarks* (2001).

² Förberedande utredning angående lagstiftning på skadeståndsrättens område, [1950] *Statens Offentliga Utredningar* (SOU) 1950:16. Strahl himself presented his ideas in an international forum through the article *Tort Liability and Insurance*, *Scandinavian Studies in Law* (1959), pp. 199 *et seq.* To some extent his presentation was preceded by

than the traditional one. Strahl made a clear difference between personal injuries and property damage. In 1951 this grip on the subject was new. In Swedish tort law the tradition was to keep the two together in all contexts. For the first time this tradition was now attacked in a consequential and energetic way all over the line.³

According to Strahl it was desirable that insurance systems should be used as much as possible to come to the victim's rescue when there was a personal injury.⁴ Compensation law should not be attached to tort law at all.⁵ In stead the compensation should be standardized in a way that satisfied the needs of the victim.⁶ Strahl pointed a vast system according to which the victim was compensated from a general insurance covering the whole Swedish people and which paid compensation without asking for the cause of the injury. The system was financed not only by the state but also by the enterprises creating the risks.⁷

Strahl, who did not find it possible to create a corresponding system for the property damage, underlined that tort law must undergo a radical system and that it was not possible to reach the goal he strived for without legislation.⁸ The Swedish legislator, however, has never intervened in the way Strahl wanted.

- 3** After Strahl the torch was carried on during the rest of the century, and even still, by *Jan Hellner*, the first professor of Insurance law of Europe. Hellner, however, was more cautious than Strahl. He has not, at least not openly, been striving for such a radical system as Strahl recommended but was satisfied in supporting in many fields the idea of tort law being substituted by insurance systems of different kinds. The ten years younger *Bertil Bengtsson* – law professor, member of the Supreme Court and extremely active in the service of the legislator – should be the one who thanks to a unique position in Swedish law life was able to drive these ideas to their practical peak. So far one can say that the Swedish model was created by legal scholars. However, important efforts were also performed through legislative work by two other members of the Supreme Court: *Erland Conradi* and *Ulf Nordenson*. And the achievements of two representatives of the insurers will always be remembered be-

the Danish law professor Henry Ussing through the article *The Scandinavian Law of Torts. Impact of Insurance on Tort Law*, [1952] *American Journal of Comparative Law*, 359 *et seq.* It has been said that the ideas of Strahl influenced Albert Ehrenzweig in his work „*Full Aid*“ *Insurance for the traffic Victim* (1954).

³ See also B. W. Dufwa, *Responsabilité du fait des produits en droit suédois*, [1977] *Revue Internationale de Droit Comparé*, 527-529.

⁴ I. Strahl (*supra* note 2) p. 98.

⁵ I. Strahl (*supra* note 2) p. 97.

⁶ *Loc. cit.*

⁷ I. Strahl (*supra* note 2) p. 98.

⁸ I. Strahl (*supra* note 2) p. 159.

cause of what they did for the Swedish model in compensation law: *Carl Oldertz* and *Erland Strömbäck*.

- 4 On the surface the role of tort law in the field of personal injury has diminished. But in a deeper analysis the astonishing truth appears: *tort law rules have been brought into and used by the special insurance systems*. So tort law is still of great importance. To cite a famous Swedish poet⁹: roses in a fractured jar are nevertheless always roses. And as these words have been cited as a proverb they are, in respect of the realities, also supplemented by the words: but everything in a fractured jar is therefore not roses.
- 5 The development of Swedish tort law during the last half of the foregoing century is however not undisputed; so one cannot say with Corneille: and the battle ended because of a lack of combatants. Some scholars are openly criticizing modern Swedish tort law. The author of this report has, for a long time expressed the opinion that the role of tort law in society is important and that tort law cannot without disadvantages, more than to a certain extent, be substituted by insurance.¹⁰ The Swedish system is very complicated and the man of the street has difficulties in understanding it – which is not positive. To this the author has strongly emphasized the role of Sweden in the europeanization of tort law. To be too much in the marginal might be dangerous when striving towards a European Civil Code.¹¹

B. Recourse action from social insurance prohibited

- 6 Since 1976 any recourse action from the Social Security System (in Sweden just called social insurance) against someone liable for the injury is *prohibited*. Since the state suffers from a bad economy one has in recent years discussed the idea of diminishing the costs of social insurance by placing the costs on those who have caused them. However, a condition – never overlooked – is that these persons have been found liable for the injuries. To come to this result one has to allow a recourse action from the social insurance.
- 7 To investigate the whole question of a recourse action from the State (or the social insurance) as well as other matters that lie near at hand, a parliamentary

⁹ Gustaf Fröding in *Idealism och realism*.

¹⁰ See for example the article B. W. Dufwa, Product Liability Legislation. General Problems and Techniques. The Swedish Experience, [1980] *Tidskrift, utgiven av Juridiska Föreningen i Finland*, 9 (written after the Swedish drug insurance came into force in 1978): „This situation is typical of what is happening in compensation law in Sweden. One may doubt the soundness of a development where everyone is responsible for everyone and where the price does not therefore reflect the real costs of an activity. On the drug market this development even comes into conflict with the general judgements on the basis of which there still exist private enterprises.“

¹¹ See *idem*, Rättsstridighet och det europeiska harmoniseringsarbetet i skadeståndsrätt, in *Festskrift till Ulf K. Nordenson* (1999), pp. 75-96, especially 94-96.

Committee was set up by the Government in 1999.¹² The result of the Committee's work, presented in January 2002,¹³ became however negative in this issue. Social democrats and the left wing together with the Chairman of the Committee found that no recourse action from social insurance should take place. The politicians looked upon the issue as a question of solidarity: all members of society have to bear these costs. Even if the tortfeasor, whoever he is, has acted in an intentional way, the idea of solidarity has to be respected.

At the end of the day the question of recourse action from the social insurance seems to be a real political one. So even if a strong minority of the Committee was in favour of a recourse action from social insurance, nothing indicates, that there will be a change in the immediate future.

C. The influence of the social insurance on tort law

- 8 Swedish tort law can be said to have been deeply influenced by the compensation system of social insurance in so far as this insurance is a system *without liability* and with *low transaction costs*.¹⁴
- 9 New insurance compensation systems (that can be called preferential insurance systems, see f below) were built up in this spirit.¹⁵ Special *boards*, that should make the courts' work in the field of compensation law unnecessary, were also created. These boards, composed of more or less specialists, became a striking feature of Swedish tort law. The effects have been clear. By substituting the courts with boards the costs were lowered.

So the influence of courts in the field of personal injuries diminished dramatically in Sweden during the second half of the last century. As a consequence one can say that the Swedish constitution was even brought into unbalance in the field of personal injuries. The victims were with one exception, work injuries, still permitted to go to court. But they rarely ever did so.

- 10 Meanwhile tort law was *criticized* in a most aggressive way. This criticism, raised by the Minister of Justice in the *travaux préparatoires* of the Damage Act, was oriented towards property damage but was particularly strong regarding personal injuries. It was considered to be important from a social point of view that the personal injuries were compensated to as large extent as

¹² See, for more details, B. W. Dufwa, *The Swedish Model* (*supra* note 1) pp. 113 and 128-132.

¹³ See *Betänkande* (SOU 2002:1) *av personskadekommittén. Samordning och regress. Ersättning vid personskada* (2002).

¹⁴ About the influence, see J. Hellner, *Social insurance and tort liability in Sweden*, *Scandinavian Studies in Law* (1972), pp. 187-209.

¹⁵ Cf. J. Hellner, *The Law of Obligations and the Structure of Swedish Statute Law*, *Scandinavian Studies in Law*, vol. 40 (2000) pp. 334-335.

possible.¹⁶ There came to be a difference between the rules for personal injuries on one side, those governing property damage on the other. The importance of tort law was supposed to diminish. Instead new insurance arrangements should be created.

- 11** On the whole the victim's right to compensation was *strengthened*. At the end of the 80s about 90 % of all personal injuries were covered by "automatic" insurance agreements. The tort law had lost a lot of importance from a practical point of view and if you only look at its own life (*cf.* above).
- 12** The influence of social insurance on the *courts* in the field of tort law is difficult to perceive. As far as is known, no direct reference to social insurance when treating tort law has been made. But there might have been an indirect influence. This can be seen in a case decided by the Supreme Court in 1981, treated below under 115.
- 13** Behind this development there were two fundamental thoughts:

1) The belief in *prevention* was nearly non-existent. Having earlier believed in the idea of prevention, Swedish legal scholars at the end of the 40s began to question the effect of prevention in the field of tort law. This has been the red line that can explain one insurance scheme after the other. Liability has come into the background. The reparation effect of damages became more stressed than ever. A strong expression of the insufficient belief in tort liability became the decrease of the liability of the employee, a change that covered not only personal injury but also property damage (see 92 below).

2) In a system where prevention has no meaning and where all is a question of paying compensation from a special insurance scheme it becomes more important than ever to reduce the *transaction costs*. The general principle of Swedish compensation law came to be that it was better to change these costs into compensation to the victim. It was considered to be more "rational" to let the money fall into the pockets of the victims than those of the lawyers.

D. Private insurance

- 14** To protect himself the victim can take individual or collective insurances (life-, sickness- or accident insurances). These do not reduce the damages.

E. Employee benefits

- 15** 15. Pension or another periodical compensation or salary during sickness are reduced from the damages if the benefit has been paid by an employer or by an insurance that has the character of an employee benefit. This means that the employer has to pay the loss and that he is not entitled to get his cost back from a tortfeasor. Criticism has been raised in the Swedish doctrine against

¹⁶ See *Regeringens* proposition 1972:5 pp. 78-100.

this system. Suppose that X, an employee of the small enterprise A, has suffered injury from an accident caused by the fault of the large enterprise B. According to the Swedish system A will have to pay pension or sickness salary to his employee X. But he is not entitled to any reimbursement for this cost.

- 16** 16. However, the parliamentary Committee set up in 1999, in its bill published in 2002 (see 7 above) proposed that the employer should have a right to recourse.

F. Preferential personal injuries

- 17** The victim of a personal injury is protected not only by the social insurance, private insurance and different kinds of benefits from work. He is also protected by special insurance schemes. Within such a scheme the injury was compensated more or less “*automatically*”. A kind of *strict* liability has here been placed on the insurer. The victim is paid up to one hundred percent compensation *according to tort liability rules*; in accordance with tort law the victim shall be placed in the same situation as if the injury had never occurred. However, the reduction for *excess* ensures that the concordance with damages is not complete.
- 18** These special insurance schemes have a *subsidiary* nature.¹⁷ They only pay compensation for what has not already been paid by social insurance or under the Occupational Accident Insurance. These schemes also make a deduction to some other benefits of the victim. The crucial rule is set down in Chapter 5, section 3 of the Damages Act (1972:207).¹⁸ It has the following wording:

“When determining compensation for loss of income, or for loss of maintenance, deduction shall be made for any such benefits the victim is entitled to obtain on account of the loss in the form of

1. compensation due under the terms of compulsory insurance pursuant to the Act (1992:381) on Social Insurance, or under the Occupational Accident insurance Act (1976:380), or any similar benefit,
2. pension or other periodical compensation or sickness pay, all under the condition that the benefit is paid by an employer of on account of an insurance which is a prerequisite.”

This means that the most important part of the burden of the schemes is compensation for non-pecuniary loss; this loss is never compensated by the compensation paid by social insurance or under the Occupational Accident Insurance Act (1. above).

¹⁷ See to the following also B. W. Dufwa, *The Swedish Model* (*supra* note 1) pp. 122-128.

¹⁸ The Act is from time to time also called the Tort Liability Act. However, the Damages Act is a title that more exactly corresponds to the Swedish title.

- 19** On one hand this system is in conflict with the ideas of Ivar Strahl in the sense that it is split and does not cover all personal injuries of the society. On the other these ideas are met in the sense that the values that characterize the bill of Strahl can be found in all of the schemes.
- 20** Together the schemes cover about 90 per cent of all the injuries. One might ask if it would not have been better to follow the ideas of Strahl to the end and to shape a system that is more integrated. How is it that the development did not take that direction? There are two answers to this question. One lies in historical occurrences. The schemes were taken step by step and without any desire to restore all together. Another explanation is to be found in the economic realities. The victims standing outside of the schemes, mainly children and the unemployed, had no cost bearers.

The schemes in question are five: (1) traffic insurance (2) safety insurance (3) patient insurance, (4) drug insurance and (5) criminal injuries compensation scheme.

1. Traffic insurance

- 21** The Traffic Damage Act (1975:1410; normally abbreviated TSL), worked out under the superintendence of Ulf Nordenson (see 3 above), came into effect on 1 July 1976.¹⁹ The solution taken was to place the responsibility to pay compensation for traffic accidents neither on the owner of the vehicle nor on the driver, but on the mandatory insurance of the vehicle, taken by the owner. The compensation was given a special name since it was considered not to be damages. It was called *trafikskadeersättning*. Nevertheless it is essentially and substantially a question of damages, since the system is built up according to tort law principles not only concerning the conditions for its payment but also regarding the size of the compensation. It is the traffic insurance, and neither the owner nor the driver of the vehicle, who has the liability, which is strict concerning personal injuries (10 § 1 st.).
- 22** TSL has not abolished the liability of fault of the driver and others. The effectiveness of the traffic insurance is such that the victim normally has no reason to make use of this personal liability. If he does, he nevertheless is entitled to be reimbursed by the traffic insurance regarding the costs paid out.
- 23** When *drivers* or *passengers* suffer injury it is the traffic insurance of their own automobile that carries the liability, which is strict. These victims must claim this insurance for compensation and are therefore not entitled to *trafik-*

¹⁹ About the Act, see J. Hellner, La nouvelle loi sur l'assurance automobile obligatoire, *Revue générale des assurances terrestres* (1977), pp. 153-170; *idem*, The Swedish Traffic Damage Act of 1975, in J. Van Steenberghe/A. Geerts (eds.) *Le dommage humain. Menselijke schade* (1981), pp. 269-282. See also, B. W. Dufwa, Assurance no-fault dans le cadre des règles de la responsabilité civile, *Les Cahiers de droit (Quebec), Numéro Special* (1998), pp. 183-204.

skadeersättning from the traffic insurance of the other automobile in collision cases.²⁰

- 24** *Other victims* – pedestrians and others – claim the traffic insurance of the automobile that has caused them the injury.

The insurance introduced in Sweden through TSL has been called a *no-fault insurance*. A universally recognized definition of such an insurance does not exist. A kind of minimum definition, however, exists. In the origin country of this insurance, USA, it is traditionally characterized by two prerequisites that must be fulfilled. One (1) is that benefits to the victim are being paid out *without fault* on the side of the one who caused the injury, the tortfeasor (no-fault). The other (2) is that the *tortfeasor* in reality normally is *released from liability* towards the victim.²¹ To these two prerequisites one has to put another one (3) that is so much referred to in the European, not to say the Swedish discussion, that it could claim to be a part of a minimum definition: the insurance works “*directly*” in favour of the victim.²²

- 25** The first prerequisite (1) is not very notable. A liability insurance covering strict liability is not rare. Certainly this kind of strict liability is not a traditional one. It is a little odd, due to the link to the insurer, who has nothing to do with the driving of the automobile. But one has to be pragmatic and the Swedish legislator has not hesitated when considering traffic insurance a liability insurance.

- 26** One could argue in the same way regarding the second prerequisite (2). That the insurance taker is wholly or partially liberated from a personal liability is nothing new as regards the nature of liability insurance. This liability covers the tort liability of the insurance taker against a third person and it is in the nature of the insurance that a claim for a reimbursement should not be raised from the insurer against the insurance taker. But the question here is another one. Is the driver or owner, or anyone else (for example a mechanic) who has caused the traffic accident and injury through his own negligence, liberated from his liability? No, is the answer of the *trafikskadelag*, he is not. He has a personal liability, based on fault. However, the realities make that a claim against him hardly ever occurs. Why should the plaintiff prefer to claim the tortfeasor personally (or his liability insurance if it covers such an injury) instead of claiming his traffic insurance? Why should he prefer to build his claim on negligence instead of building it on strict liability? As a matter of fact there might be some situations where the plaintiff might have an interest in choosing the tortfeasor instead of the insurer. That is for example when the

²⁰ Here one finds the idea of „direct insurance”.

²¹ Cf. B. W. Dufwa, Vår komplicerade trafikskaderätt och framtiden, [1979] *Svensk Juristtidning*, 401-495, especially p. 428.

²² Cf. *loc. cit.* p. 431 at note 94, p. 456 at note 188 and p. 464 at note 229.

limitation period has lapsed concerning traffic compensation but not regarding damages. But situations like that hardly ever exist.

And finally. *If* the plaintiff claimed the tortfeasor personally for damages and the tortfeasor paid, the tortfeasor would be entitled to reimbursement from the traffic insurance (Section 19 par. 1). Such a right to recourse against the traffic insurance is prohibited when the tortfeasor has acted intentionally or grossly negligently. In these two cases, the second prerequisite (2) does not fit. But also here all is a question of such a little derogation that one could overlook it in this terminological context.

- 27 The situation is different with the third prerequisite (3). All kind of victims who have suffered injuries, caused in the course of the traffic, are entitled to a right of compensation from the traffic insurance.
- 28 That the *owner* of the automobile, the one who signed the traffic insurance, has such a right is remarkable, since the insurance he has taken is a kind of liability insurance. The reason for this is that the traffic insurance is not only a liability insurance. It is also a personal insurance, taken by the owner. So, in reality, and as far as personal injuries are concerned, the traffic insurance is a combined liability insurance and personal insurance.
- 29 It might also seem to be peculiar that the *driver* has such a right too. Suppose that the automobile runs into a tree and that there is no one liable for this accident. In France they say: since there is no liable person, the driver cannot receive compensation. But in Sweden the legislator on the contrary, said: certainly there is no liable person, but there is a traffic insurance and this ought to pay for this. Before TSL the driver was not covered by the same reason as in France: the rules were tort law rules. The legislator changed all with TSL. The traffic insurance covers also injuries of the driver.
- 30 Also the injured *passenger* claims compensation from the traffic insurance. So if he was sitting in the automobile that went into the tree in the example above, he too would be entitled to compensation.
- 31 The same, finally, is true concerning injured *pedestrians* and *other victims*.
- 32 The right to compensation *directly* from the insurer has a special meaning regarding those victims who are sitting in the automobile. In collisions they are prohibited to ask for compensation from the traffic insurance of the other automobile. Drivers and passengers are obliged to stick to the insurance of their own automobile. How to apportion the loss between the colliding automobiles is a later question for the insurers.
- 33 All this means that one stands in front of an insurance system with a remarkable character. It protects the insurance taker not only against liability against a third party suffering personal injury. It also gives protection against personal

injury caused to the insurance taker if he is the driver, or the driver who is not the insurance taker. The insurance is founded on tort law principles as other liability insurances. But at the same time it contains exceptional derogations from these, derogations that have been forced by realities demanding that the possibilities for the victim to be compensated became strengthened. It all concerns a mix of a strange sort, certainly made possible thanks to the simplification that arises when one is dealing with a registration system combined with a mandatory insurance.

2. Work injuries: TFA

- 34** TSL was preceded by an insurance covering work injuries with approximately the same function concerning personal injuries: *trygghetsförsäkringen* (security insurance) vid (at) *arbetskada* (work injury)(today abbreviated TFA).²³ This insurance started in 1973 covering only one group of professionals (*stvedores*) but was thereafter spread to nearly the whole Swedish work field. TFA is based on a collective agreement between SAF (Svenska Arbetsgivarföreningen, a trade association) and LO (Landsorganisationen, the national trade union), the two largest organisations in the domain of work in Sweden. The agreement states that an insurance for work injuries has to be set up and that the premiums for this insurance must be paid by the employers. TFA is voluntary in the sense that it is not regulated by the legislator. Workers of an enterprise that is not bound by the collective agreement (because they are not members of a trade association) are outside the insurance coverage; although they have nothing to do with their employers' policy concerning trade associations, they are not entitled to any compensation from TFA. The insurance covers personal injuries caused by accidents at work, accidents in travelling to or from work as well as occupational disease that has been existing more than 90 days. This compensation scheme is, as the mandatory traffic insurance, built up through tort law rules. The liability of the employer is purely strict, meaning that fault caused by the employer or by some of his employees needs not to be proven by the victim; the liability of TFA is strict.
- 35** Work injuries are basically covered by the social insurance system, which is composed of national insurance and the occupational injuries insurance. TFA is a completion to this system. This means that TFA only covers what has *not* been paid by the social insurance. The most important part of losses, paid by TFA, concerns non-economic losses; these are not paid at all by the social insurance system.
- 36** Compensation for work injuries is in the frame of *social insurance* essentially paid by the employers through charges paid by them. TFA is also paid by the employers, but through premiums to an insurance.

²³ See J. Hellner, „Geborgenheitsversicherung“ – eine neue Stufe in der Entwicklung des Arbeitsunfallsschutzes in Schweden, in *Festschrift für Ernst Klingmüller* (1974), pp. 159-171.

- 37** It has been discussed whether it would not be advantageous to bring together all the costs for work injuries within *one single mandatory no-fault insurance*. Proponents for such a system believe that premiums built on an individualized risk rating would stimulate employers and insurers to take more loss-prevention measures. Against this idea, however, it has been objected that the present system, where no such risk rating is done, is easier to administer and results in lower transaction costs. The objection has also been raised that employees working in enterprises with high risks might get lower salaries. It has also been argued that a differentiation of premiums might create difficulties for some persons to have access to the labour market. Anyhow, till now, no changes are planned in the present system.²⁴
- 38** Another question that has been vividly discussed concerns work injuries caused by *crime*. Should these injuries be paid by the State through the Crime Compensation Scheme (see 63-65 below) or by the employers? The present system is built on both. TFA pays compensation but not enough. The rest is paid by the Crime Compensation Scheme. The government has expressed the opinion that it is reasonable that the employers also pay what is today paid by this scheme but has at the same time found that the best solution would be not to legislate. TFA ought to expand its application to cover also what is paid by the Crime Compensation Scheme.²⁵

3. Patient insurance

a) Introduction

- 39** A special Swedish insurance covers injuries related to medical treatment. It is called “the Patient Insurance“, and was created in 1975, not long after the TFA. It was from the beginning, just as the TFA, voluntary.²⁶ However, in 1996 the patient insurance became regulated through the Patient Injury Act (1996:799). This Act came into effect on 1 January 1997. It was, to a large extent, built on the voluntary Patient Insurance.

b) The background

- 40** County Councils of Sweden, together with some local authorities, provide official medical care in Sweden.²⁷ The Councils and the local authorities are considered to be employers of doctors, nurses and others working within the official medical health care. In 1975 they undertook to pay compensation, according to certain rules, to those injured by medical treatment. This was in fa-

²⁴ See SOU 2002:1 (*cf. supra* note 13), pp. 88-89.

²⁵ See *Regeringens* proposition 1998/99:41 pp. 37 *et seq.* *Cf.* SOU 2002:1 pp. 90-91.

²⁶ About this insurance, see J. Hellner, Sweden, in: E. Deutsch/H.-L. Schreiber (eds.) *Medical Responsibility in Western Europe* (1985), pp. 683-728. See also B. W. Dufwa, La responsabilité disparue, in: *L'indemnisation des accidents médicaux* (1997), pp. 57-80.

²⁷ See to the following also B. W. Dufwa, La responsabilité disparue (*supra* note 26), pp. 57-86.

vour of the patients, although these were never part of a contract: the undertaking was one-sided.

- 41** This undertaking was insured. The insurer became the Consortium of Patient Insurance, consisted of the four leading insurers of Sweden. The construction of the Patient Insurance was under supervision of Governmental authorities.

Successively the Patient Insurance covered more and more of the Swedish health care. Finally the insurance covered all public health and medical care services. Also private care providers were able to take the Patient Insurance and so they did.

- 42** If the injury was covered by this insurance, the patient had a direct right to compensation from the insurer according to certain conditions. To some extent the patient could recover without proving that the injury had taken place through fault. The size of the compensation was in principle the same as the one prescribed by the Damages Act (1972:207).

- 43** The Consortium ceased with the year 1994. One reason was that the whole organisation and construction of the Patient Insurance was in conflict with the rules on unfair competition. Four large insurance companies had “killed” the whole market in this field. A new Act on Unfair Competition was adopted and came into effect on 1 July 1993. Sweden had become a member of the European Community (EC) and this had forced the country to suit itself to the rules of EC. But there was also another reason for the stoppage of the Consortium. An increase of private caregivers was expected because of the privatisation trend within health care. The public control of the health care was reduced.

- 44** The County Councils resolved the problems that arose when the Consortium ceased to work by creating *Landstingens Ömsesidiga Försäkringsbolag* (LÖF) (the County Councils’ Mutual Insurance Company). This insurer took over the activity of the Consortium. However LÖF preferred to leave the claim settlement to a joint-stock company: Personskadereglering AB.

c) The Act

- 45** To build the liability for patient injuries on contract law was never even discussed in the legislation work. On the other hand the possibility of using the tort law rules was much debated. The legislator, however, finally decided to build up an independent system, separated from the tort law rules as far as some of the conditions of the liability are concerned.

- 46** During the legislation process the proposal for an Act was referred to Stockholm University for consideration. The University found that tort law, including a severe liability, might function as well in this context. The refusal by the government to accept this way of acting was that there was no more time left for such a profound analysis that was needed. It was considered to be

important to stop every delay. However, if it turned out that the new Act had essential disadvantages or that the development within tort or insurance law or social insurance law gave a reason for this, the Government said that it was prepared to reconsider and come back with a proposal for how the compensation system regarding patient injuries should be done.²⁸

- 47** In the discussion preceding the legislation it was argued that a system built on the *fault* rule was better able to satisfy the prevention idea. Others objected that the preventive function of the fault rule was in dispute at all. In the area of health care and medical treatment in particular, they claimed that cautiousness could – if at all – not be stimulated by the risk to pay compensation. Disciplinary punishment and punishment were enough to be able to reach prevention.²⁹
- 48** The attitude to *prevention* becomes clear already from the title of the Act. The Act is not called “Patient Liability Act” but “Patient Injury Act”. The rules of the Act did not take as their point of departure the action that caused the damage, nor the injury, but the compensation. It is the indemnification (in Swedish: “ersättning”) that is the core of the rules.³⁰
- 49** Compensation paid by the Patient Insurance is consequently not called damages. It is called *patient injury compensation* (“trafikskadeersättning”). This is the first and most important notion of the Act. The first Section of the Act prescribes the right to patient injury compensation. The second important notion is the insurance itself: there is an obligation of health care providers to have this insurance (Section 1). The term liability has disappeared in the Act.³¹
- 50** Patient Insurance is a *mandatory* insurance. The Act prescribes a duty for the health care providers to have a patient insurance that provides compensation for injuries covered by the Act. (Section 12). Such health care providers can be of two kinds: public or private (Section 5, par. 2). Since the Act is not completely built on tort law rules regarding the conditions of liability, one cannot call it a liability insurance in the traditional meaning of such an insurance. One could characterize it as a mixture between a liability insurance and a social insurance.
- 51** Those insurers who issue patient insurance shall be affiliated to a patient insurance *association*. The Government, or an authority appointed by the Government, is to determine the by-laws of the Association (Section 15).

²⁸ See [1996] *Nytt Juridiskt Arkiv* (NJA) II, 476-477.

²⁹ See *Regeringens proposition* 1995/96:187 pp. 19-20.

³⁰ § 1 of the Act lays down: „This Act contains rules on the right to patient injury compensation and on the obligation of the health care provider to have an insurance that covers such compensation (patient insurance).“

³¹ *Cf.* the title of the article written by Dufwa and referred to *supra* note 27 .

- 52** Patient injury compensation is to be paid out by the *insurer* (Section 13). In the absence of patient insurance (which might happen although the insurance is mandatory), the insurers affiliated to the Patient Insurance Association in accordance with Section 15 are jointly liable for the patient injury compensation which would have been paid if a patient insurance had existed. In such a case the Association will represent the insurers (Section 14, par. 1).
- 53** The insurers affiliated to the Patient Insurance Association shall together maintain and finance a *Patient Claims Panel*. The Panel shall include representatives of the patients' interest. Further regulations concerning the Panel's composition are issued by the Government (Section 18, par. 1).
- 54** In *three* cases the Patient Insurance can *recover* what has been paid out. (1) If patient injury compensation has been paid for a loss caused intentionally or by gross negligence, the insurer assumes the rights of the injured party to tort damages up to the sum paid (Section 20, par. 2). (2) If patient injury compensation has been paid for an injury covered by the Product Liability Act (1992:18), the insurer assumes, up to the sum paid, the rights of the injured party to damages under that Act. (3) If an injury is covered by traffic insurance in accordance with the Traffic Damages Act (1975:1410) and if patient injury compensation has been paid for the injury, the insurer assumes the right of the injured party to traffic damages compensation up to the sum paid (Section 20, par. 3).
- 55** The victim must be a *patient*. This means that he must be someone who has established a contact with the health care providers concerning his own health.³² Equivalent to a patient under the Act is a person who voluntarily participates as an experimental subject in medical research or who donates an organ or other biological material for transplantation or for other medical purpose (Section 2).
- 56** The Act only applies to injuries arisen in *connection* with health and medical care services in Sweden (Section 3). With health care is understood an activity which is performed according to some special Acts in the field (Section 5).
- 57** Compensation is granted if there is an *overwhelming probability* that the injury is caused by some acts, faults or other circumstances specifically mentioned in the Act (Section 6).

4. Drug insurance

- 58** On 1 July 1978, an insurance arrangement concerning injuries caused by medicines came into force in Sweden.³³ This scheme was set up by manufac-

³² See [1996] NJA II, 478.

³³ Cf. to the following B. W. Dufwa, Product Liability Legislation (*supra* note 10), pp.1-11.

turers and importers of drugs and insurance companies jointly. It is an exaggeration to say that the work done was voluntary. It was performed with the “aid” of the legislature, which in March 1976, had proposed an Act on Compensation for Injuries due to Medicines.³⁴ The insurance arrangement was built on this proposal. If the arrangement had not been created, the proposed act would have been adopted. So in reality the insurance arrangement was established in response to threats of legislation.

- 59** The insurance scheme is intended to give compensation insofar as other sources (such as social insurance) do not and is financed by the manufacturers and importers of drugs. This compensation system, as well as the proposed Act, expressed a radical approach to product liability problems. Fault need not be proven for compensation to be received from the insurance. Nor need the victim show that there was a defect in the product.
- 60** The fundamental idea was that the state places drugs under strict control, but, at the same time, by approving them, takes incalculable risks. Under these circumstances the state also has a duty to take measures so that at least serious injuries due to medicines are fully compensated. Therefore the state also initiated the voluntary insurance scheme.
- 61** More important, however, as an explanation of the severe liability that in Sweden has been placed on the producers and importers of drugs are the economic conditions in the drug field. These were supposed to be able to permit a comparatively far-reaching liability. The turnover was high. The price setting was controlled by the public. And a large part of the costs was already shouldered by social insurance and by those who were responsible for the public medical service; what remained did not represent a large part of the total sum.
- 62** Other considerations which were supposed to speak in favour of joint liability for manufacturers and importers of drugs were the following. When an injury was said to have arisen from a drug, it was often difficult to decide if this was true or if the origin was not in the sickness itself. The consumer often used several drugs; the difficulty in deciding which one had caused the injury was evident. Different drugs can have the same secondary effects. Conditions such as these were referred to in claiming that a joint liability was necessary to make an insurance arrangement “effective”.

³⁴ Produktansvar I – Ersättning för läkemedelsskada. Betänkande (SOU 1976:23) av produktansvarskommittén. SOU 1976:23 (in English: Product Liability I. Compensation for drug injuries. Law proposal by the Product Liability Committee. State’s commissions nr. 23 (1976). With a Summary in English).

5. Criminal injuries compensation scheme

- 63** Already in 1948 a compensation scheme for criminal injuries was introduced in Sweden.³⁵ This system, however, was limited to protect only persons living in the neighbourhood of penal institutions; it covered both personal injuries and property damage. With the Criminal Injuries Compensation Act in 1978 state compensation was given a legislative basis for the first time. The scheme is financed by public taxes. The rules of this scheme are general tort law rules. There are however clear derogations. One of them is that minimum and maximum sums are set forth in the Act. Another one is that many judgments that have to be taken are based on “reasonableness”.
- 64** To receive compensation the victim has to prove that he or she has no other means of obtaining compensation. As with all the other compensation systems above, the compensation is *subsidiary* in relationship to social insurance, private insurance and other sources of compensation..
- 65** The authority in charge of compensation is the Crime Victim Compensation and Support Authority. According to the Decree on the Crime Victim Compensation and Support Authority, a *Board* has to be established to decide the issue of compensation in cases of more principal nature. The compensation assessment of the Board resembles a court in many respects. There is no possibility to appeal against the decisions of the Board.

II. Principles of Liability and Statutory Basis

A. Overall view of the provisions regarding liability

1. The Damages Act

- 66** Sweden is one of the few countries of the world that has complete general tort law rules assembled in one Act. The Damages Act (1972:207) came into force on 1 July 1972.³⁶ The Act does not treat tort law exhaustively. It is general and can be applied under very different circumstances. The rules of the Act are supposed to be completed by “universally recognized tort law principles”.³⁷
- 67** The Act has the character of “*frame legislation*”. This means that it is not permitted to interpret its rules *e contrario*. So for example the Act contains the rule of fault. This does not mean that a strict liability is excluded. This legis-

³⁵ See to the following Anna Wergens, *Crime Victims in the European Union* (1999), 425-435.

³⁶ About the Act, see J. Hellner, La nouvelle loi suédoise sur la responsabilité civile, [1973] *Revue Internationale de Droit Comparé*, 686-692; *idem*, The New Swedish Tort Liability Act, [1974] *American Journal of Comparative Law*, 1-16.

³⁷ See U. Nordenson/B. Bengtsson/E. Strömbäck/Skadestånd, *Huvuddragen av skadeståndsrätten. Kommentar till skadeståndslagen. Annan skadeståndslagstiftning m.m.* (2nd ed. 1976), 78-80.

lative technique harmonises with the way of working before the Act. The fault rule was the main rule but the courts could sharpen the liability and did so successively. The general character of the Act makes it possible to work with special legislation on tort law.

- 68** As a consequence of the character of the Act the legislator has assumed that the Act will be *changed* continuously in the future. Such a revision is facilitated by the fact that the Act is divided into chapters with a separate subdivision of each chapter.
- 69** The Damages Act contains rules regarding the *whole law of tort*, conditions of liability, joint and several liability, mitigation of damages and size of the damages. Only two kinds of conditions, however, are treated: fault liability and vicarious liability.
- 70** The Act is applicable on *tort law* as well as *contractual* circumstances. According to the introductory article of the Act, its provisions “shall be applied unless otherwise provided by law or by a contract or by rules governing contractual liability.” This is to be understood in the following way.³⁸
- 71** The Damages Act expresses the view that there are universal and fundamental tort law rules and principles that are practically always applicable also in cases regarding contracts. These tort law rules are supposed to form the *point of departure* in claims concerning contractual damage. The Damages Act therefore is also applicable in contract law, unless otherwise provided by law or under a contract and subject to any applicable rules or principles governing contractual liability (Chapter 1, section 1 of the Damages Act). In reality this means that the tort law provisions of the Act are normally pushed away by contract rules and provisions. Very often this means that liability is sharpened; the fault liability of the Act might for example be put aside in favour of a presumed liability of fault in contract law. But compared to tort law the liability can also be more limited in contractual relationships. This might for example be the case with limitation. Contracts implying derogations from the tort rules imposed in the Damage Act are in full respected.
- 72** Respected are in principle *disclaimers*. However, they are in principle not respected regarding personal injuries.³⁹ They might be declared not guilty by the courts as considered to be unreasonable according to Section 36 of the general Contract Act (1915:218).
- 73** The Damages Act covers *personal injury* as well as *property damage* (Chapter 2, Section 1) For two cases (crime [Chapter 2, section 2] and wrongful act

³⁸ Cf. *ibidem*, pp. 31-33.

³⁹ See B. W. Dufwa, Droit suédois comparé au droit français, in: *Les clauses limitatives ou exonératoires de responsabilité en Europe* (1990), pp. 57-80.

or omission done in the course of, or in connection with, the exercise of public authority [Chapter 3, section 2]) the Act also covers *pure economic loss*.

- 74** Victims suffering from a very special type of non-pecuniary loss are also protected by the Act. It is stipulated that he or she who seriously offends someone else through a crime consisting of an attack on this person's freedom, peace or honour, shall compensate the harm caused by the offence (Chapter 2, section 3). This type of compensation is called *infringement compensation* ("kränkingsersättning"). Only injuries caused by a crime are compensated according to this rule. However, this does not mean that the tortfeasor must have been condemned to a punishment by a court. It is enough that it has convincingly been proved that a crime must have taken place.

Infringement compensation is not only paid when the tortfeasor acted in an intentional or grossly negligent way. The Damages Act since 1 January 2002 also gives the victim a right for compensation for non-pecuniary damages when the injury has been caused by "simple" negligence.

- 75** Much discussed has been the question whether people such as police officers, watchmen and other *vulnerable occupational groups* should be entitled to infringement compensation. In one case, NJA 1999 s. 725, the Supreme Court found that a police officer who had been spat upon in the face was not entitled to such a compensation. This attitude has been criticized by the government in a legislature matter.⁴⁰
- 76** With personal injury is understood *physical* as well as *psychical* states in bad condition. Psychical deficiencies might be the result of a shock or of subsequent traumatic neurosis. For psychical troubles to be regarded as personal injury there must be a medically provable effect. Such an effect might appear in the way that the victim has been on sick leave. However, this is not a necessary condition for being able to say that there is a question of a personal injury.
- 77** Personal injury on the whole stands in a class for itself. This kind of damage is from a *social point of view* considered to be more important to compensate than property damage and pure economic loss. Thus, in some regards the rules are more advantageous for the victim of a personal injury than for other victims. The clearest difference of this kind concerns the rules of contributory negligence (see 110-111 below).
- 78** The Swedish *technique of legislative process* differs from what is usual in most European countries. On the whole the legislation work is heavy, time-wasting and very detailed. The work results in official, printed documents that are extensive. The Product Liability Act, containing only fourteen articles and built on the EEC-Directive from 1985, gave rise to more than one thousand

⁴⁰ See *Regeringens proposition* 2000/01:68 p. 50.

printed pages. *Travaux préparatoires* (usually called “motives”) are consequently referred to by the courts and give guidance in details as well as on the whole.

As the motives are so rich the legislator might permit himself to let the Act be short and even unclear. As far as the liability of employers or of the State or of municipalities are concerned, one article of the Damages Act stipulates that compensation for property damage “may be reduced if this is deemed reasonable on account of existing insurance coverage or possibilities to obtain such coverage.” (Chapter 3, section 6). It is not easy to understand what this means without studying the motives. Here different situations are developed that explains in detail the ideas of the legislator.

- 79** To this one has to add that legislation in compensation law often uses the word “*reasonable*” to an extent that in Europe is unique for Sweden. One might think that through this use the power of the judge increases. This, however, is wrong, since the real power lies with the politicians, explaining in the *travaux préparatoires* in detail how the Act shall be understood.⁴¹

2. Special provisions

- 80** Besides the Damages Act there are, as in most countries, special legislation, of which the most important object is to sharpen the liability. Like the Damages Act, the special legislation covering personal injuries normally covers both injury and property damage. In the Act as well as in the special legislation there are, however, provisions that only concern personal injury. An example with reference to the Damages Act are the rules concerning the size of the damages. Special legislation only covering personal injury is, for example, the Patient Insurance Act (see 39-57 above).

3. Categories of liability

- 81** Tort liability for personal injury is grouped in the same way as regarding other kinds of damage. The grouping has in view the conditions for liability and differentiates between: liability for (1) one’s own fault, (2) another’s fault and (3) irrespective of fault. The liability according to 2 and 3 is called strict. To separate categories 2 and 3 from each other, category 3 is called pure strict liability.

4. Limits of liability

- 82** A striking feature of Swedish tort law is the well-developed rules *limiting* liability. The most important one of these rules is the one permitting the judge to reduce the damages when the tortfeasor does not have money enough to pay compensation. A condition for such a reduction of the damages, however, is that the victim does not have a need for compensation. The reduction takes

⁴¹ Of course, in reality the work of the politician’s is done by lawyers.

place after a test trying to find out what is considered to be “reasonable“, having regard also to other relevant circumstances (Chapter 6, section 2 the Damages Act).

- 83** Another such rule, showing the pragmatic way of working that characterises the Swedish legislative process, is the one regarding injury (and loss of or damage to property) caused by any *minor* under the age of eighteen. The minor is liable if and to the extent that this is reasonable, having regard to age and degree of maturity, the nature of the act or omission by which the damage was caused, the existence of any third party liability insurance covering the damage, economic facts at large, and other relevant circumstances (Chapter 2, section 4 the Damages Act). In the *travaux préparatoires* the principle is that when deciding whether the minor has been negligent or not, he or she must be compared with an adult. This means that most children are easily considered to be liable. If there is a liability insurance that covers the injury (loss or property damage) a reduction of the damages is not permitted. But if there is no liability insurance, a reduction might take place according to the circumstances mentioned in the Act (see just above).

B. Liability based on fault

- 84** There is no statutory accepted *definition* of fault in Swedish tort law. The legislator, in adopting the Damages Act, confined himself to mention two kind of actions, those performed wilfully or by negligence (Chapter 2, section 1).

In the Swedish *doctrine*,⁴² however, a description has been given in a way that to all appearances would be accepted by the Supreme Court. This clarification adheres to well-known definitions given in Winfield & Jolowicz and by Chief Justice Learned Hand. In the scale three factors have to be weighed: (1) the probability of damage, (2) the gravity of the injury ((1) and (2) with the words: “magnitude of risk”), (3) the burden of adequate precautions.

Describing what is to be meant by fault, Swedish legal scholars take their point of departure in the ideal action but then complete their description of this action by referring to the guidance that can be given by statutes, cases and customs; to some extent even criminal law can play some role in this respect. When such sources are missing, or as a completion to them, other sources are also referred to: interest adjustments, social views and economic arguments; on the whole the purpose of the rules, insurance and social values are underlined. Swedish judges are well aware of their power to achieve a reasonable result by having confidence in the negligence rule.⁴³

- 85** *Presumptions* of fault can be considered to lie between liability based on fault and strict liability, although in reality it comes closer to strict liability than li-

⁴² See J. Hellner, *Skadeståndsrätt*, pp. 130 *et seq.*

⁴³ See B. W. Dufwa, *Flera skadeståndsskyldiga I* (1993) nos. 2105-2112.

ability built on negligence. Among Swedish courts there is traditionally a “horror” to use presumptions of this type. It is considered to be more honest to speak about strict liability directly. Nor does the legislator use presumptions of fault. The situation is quite another in contract law.

Where statutes have been infringed, “*negligence per se*” or “statutory negligence” may be realities also in Swedish tort law.⁴⁴

More important is that there are many cases where it is clear that the courts have raised the standard of care in an artificial and unnatural way (“*fictitious negligence*”). In the Swedish doctrine it has long been supposed that there are certain areas where the courts act in this way. One such area concerns injury or damage caused by defective things and especially premises.⁴⁵ There are also cases where small but many mistakes have been made by the tortfeasor (and where the courts thus might have argued according to the principle that many a little makes a mickle; *les petits ruisseaux font les grandes rivières*).

- 86** The general observation, often made, is that the demand for behaviour generally is higher in *contract law* than in tort law.
- 87** The personal liability of the *employee* for wrongful acts and omissions in the course of his employment is reduced to a considerable extent; on the whole it has been abolished, see c below.

C. Vicarious liability and liability of enterprises

- 88** The Damages Act takes the normal⁴⁶ *European position*. An employer is liable to pay compensation for personal injury and property damage caused by fault of his employee in the course of his employment. Likewise the employer is liable when his employee has caused a pure economic loss through crime (Chapter 3, section 1, par. 1). The concept of employer is interpreted in a broad way. Also a private person might be an employer, as for example the mother who asks a neighbour to take care of her children for let us say a quarter of an hour. Although the neighbour might not be paid, she is considered to be the employee of the mother. The boy who cuts his parents’ lawn is also considered to be an employee. But somewhere there is a limit. If the lawn is very small he will not be conceived as an employee. Nor he will be when doing housework.
- 89** The concept of “*in the course of employment*” is also interpreted widely. The employer is liable also regarding sexual outrages by the employee if there is a

⁴⁴ Cf. F. Schmidt, *Arbetsgivares skadeståndsansvar vid olycksfall I arbete*, in *Skadeståndsrättsliga spörsmål* (1953), from p. 189, particularly pp. 197-198. Cf. J. Hellner (*supra* note 42) p. 143.

⁴⁵ See especially I. Strahl, in *Festschrift till Marks von Württemberg* (1931) p. 577, particularly pp. 586-587.

⁴⁶ It seems as if only Germany differs from this position.

connection to his work. Even killings might take place “in the course of employment”. Sometimes one has to do sophisticated causal analysis of what has happened. If an employee assaults another employee the employer will be liable if the assault and battery against the other employee was caused by something regarding the work; the employer on the other hand goes free if the assault and battery concerned a girlfriend.

- 90** The *defences* of the employer (for example contributory negligence) are the same as in the general tort law.
- 91** As seen the *victim* might be another employee. The victim can also be a third party. Looking to realities there is a huge difference between these two situations. In the first case TFA (see 34-38 above) will cover the injury. When the victim is a third party there is no such coverage.
- 92** The personal liability of the *employee* is suppressed. It only exists if and to the extent that there are “extraordinary reasons” for such liability, having regard to the nature of the employee’s act or omission, his position, the interests of the victim and other relevant circumstances (Chapter 6, section 1 the Damages Act). This is a most important and striking part of Swedish tort law. The “extraordinary reasons” must be very strong. In reality they are rare. Clearly they might cover intentional acts and omissions. But it is not sure that gross negligence is enough for a personal liability of the employee.
- 93** In *contractual law* the principal rule is that there is a general liability for injury (and damage) intentionally or negligently caused by all kinds of assistants.⁴⁷ In *tort law* the liability for other person’s acts or omissions is restricted. First there is the employer’s liability for injury (and damage) caused by employees (according to what has been said above). Secondly there is also in exceptional cases a liability for acts and omissions caused intentionally or negligently by independent contractors. Such an exceptional case is where the employer has laid the responsibility upon another, although his duty was “non-delegable” (judge-made law). Other cases concern product liability (legislation) and environmental law (legislation).

D. Pure strict liability

- 94** Pure strict liability (*cf.* 81 above) has been adopted by the *legislator* or, without support of legislation, by *courts* mainly in the following contexts: injuries caused by some animals (above all dogs and wild animals kept in captivity), in the transport field (traffic, railway, aviation), in the nuclear field, in connection with some other dangerous activities (*inter alia* electric plants), in the environmental field and concerning product liability.

⁴⁷ J. Hellner (*supra* note 42) p. 164.

- 95 The freedom of the *courts* to adopt pure strict liability without support from the legislator has never been called in question. When they have done so, as was the case in the environmental field, the legislator often comes after and stipulates the new rules.
- 96 The areas of automobile traffic and health care⁴⁸ have been described above (21-33 respectively 39-65). Compensation for injuries caused by *defective products* is treated by the Product Liability Act (1992:18), an Act that is built on the EEC-Directive from 1985. The Act, which came into effect 1 January 1993, does not involve liability for development risks⁴⁹ but covers liability derived for agricultural products.⁵⁰ There is no financial limit in the Act (*cf.* Art. 16 of the Directive and what is said 82 above). Remarkable is that the special Swedish rules about contributory negligence concerning personal injury (see 110-123) has not been kept in the Product Liability Act. Mitigation because of contributory negligence is possible also when the act or omission of the victim that caused the injury was *not* intentional or grossly negligent. So here the same rules apply for personal injuries as for property damage (suffered by the consumer).

E. Loss of chance and uncertain causation

- 97 There seems to be no obstacle to compensate a *loss of chance* if there is a clear probability that the victim would have taken the chance. In the case NJA 1964 s. 431 a student was injured in a traffic accident. If the accident had not occurred, the student would have been able to pass an examination six months later. Then, he immediately would have got employment as a teacher. Because of the accident his examination was delayed for one year. The Supreme Court awarded the victim one year's lost income as a teacher.⁵¹
- 98 In the case NJA 1961 s. 425 the victim had been assaulted by some drunken persons and herewith suffered a skull injury. Some years later he was run over by a car. Once again he suffered a skull injury. It could not be established *to what extent* each of these events had contributed to the final skull injury. The Supreme Court found that to the protection of the victim, the principle ought to be that the tortfeasors should be jointly and severally liable. This rule has been considered to be the general rule concerning personal injury.⁵²
- 99 Suppose that it is clear that A or B has caused the injury. However, it is not clear *which of them* did it. Swedish judge-made law cannot give a clear answer on the question what rule ought to be applied in such a case. In the doctrine a liability with regard to what is reasonable is considered to be the appropriate

⁴⁸ *Cf.* Art. 15.1.a. of the Directive.

⁴⁹ *Cf.* Art. 15.1.b. of the Directive.

⁵⁰ *Cf.* Art. 16 of the Directive.

⁵¹ See also [1993] NJA, 68.

⁵² So B. W. Dufwa, *Flera skadeståndsskyldiga* II (1993), no. 2997.

solution.⁵³ Special insurance solutions apply in relation to traffic accidents and to environmental cases.

F. Special provisions in the area of transport law

100 See above.

III. Burden of Proof

101 The general principle, or the point of departure, is that the burden of proof lies on the victim. This is so in all respects, causation, fault and so on.⁵⁴ According to the main rule there is no difference between *property damage* and *personal injury* in this respect. But in one way or the other one has a clear feeling that a court in this regard might be more generous to the victim when he or she has suffered personal injury than when he or she had had a property damage. One has to look to the context in which the question arises.

A. Fault

102 The concept of fault is composed of many facts and what is asked for concerning proof might vary between them. That an injury has happened *might* speak in favour of the conclusion that someone has been negligent, but that is all one can say. The principle of *res ipsa loquitur* does not exist in Swedish tort law.⁵⁵

103 A typical difficult case is the proof that someone responsible for the *road maintenance* did not foresee the bad weather; therefore he did not grit the road in time and an accident occurred. Here the victim often fails because it is difficult for him or her to prove that the one responsible for the road maintenance had a special reason to foresee the risk.⁵⁶

104 A group of important cases concerns property damage after the owner had borrowed his thing to someone else. Principles that could be drawn out from these contractual cases could certainly be applied also to personal injuries. In these cases there is a tendency of the courts to look more to the circumstances in the individual case than to look to harsh rules for certain types of contracts.⁵⁷

B. Causality

105 The proof concerning causality in personal injury cases has become an ever increasing *problem* to Swedish courts. This is particularly so in regard to

⁵³ B. W. Dufwa (*supra* note 52) no. 3032.

⁵⁴ B. W. Dufwa (*supra* note 52) no. 2648-2651.

⁵⁵ It has nonetheless been discussed and recommended particularly concerning product liability by the author of this report, see B. W. Dufwa., *Produktansvar* (1975) 77-78.

⁵⁶ See for example [1977] NJA, 281 and *cf.* J. Hellner (*supra* note 42) p. 146.

⁵⁷ See J. Hellner (*supra* note 42) pp. 146-147.

whiplash cases.⁵⁸ But also in other fields it is easy to see that Swedish courts in cases concerning compensation for personal injuries face great difficulties when they have to decide if the victim has succeeded in proving the causal link between the act or omission and the injury. This is so not at least in cases regarding environmental and product liability.

- 106** One clear problem in personal injury cases concerns “*alternative possibilities*”.⁵⁹ In several cases⁶⁰, the Supreme Court has relieved the burden of proof of the victim when there has been difficulties for the victim to furnish complete proofs that another possibility is excluded. The following principle has been settled. If the defendant alleges that the cause of the injury is another circumstance than the one alleged by the victim, the statement of the victim must be respected, if it is “clearly more probable” than the one given by the defendant. However, this jurisprudence has not always been favourable to the victim. The principle used has in reality been used in a way that was contrary to what it was supposed to be.⁶¹ It has been interpreted *e contrario*, meaning that when two causes are both probable but none of them is “clearly more probable” the victim has been denied compensation.⁶²
- 107** The *legislator* has intervened in two situations. The first one concerns environmental liability. According to Chapter 32, section 3, par. 3 *miljöbalken* (1998:808) it is enough if there is a “predominant” causality between the disturbance and the damage or injury, when the disturbance is water pollution, including pollution and change of the level of ground water, and nuisance (noise, shaking, stench etc.). This special rule was strongly criticized during its preparation. It was said that causality issues should be decided by courts, not by the Parliament. In spite of this resistance, it was finally taken by the legislator with the reservation that the rule should not be interpreted *e contrario*.⁶³
- 108** The other situation where the legislator has intervened in a causality question concerns patient insurance. See 57 above.
- 109** One of the problems is that the causality question might have a connection to some other issue and that the result more depends on this other fact than the causation issue in itself. If a court has considerable difficulties in introducing a strict liability, it might prefer to cut off the problems in saying that there is

⁵⁸ See J. Hellner (*supra* note 42) p. 199.

⁵⁹ Cf. J. Hellner (*supra* note 42) p. 200.

⁶⁰ [1977] NJA, 176, [1982] NJA, 421, [1991] NJA, 481, [1993] NJA, 764.

⁶¹ See B. W. Dufwa, *Flera skadeståndsskyldiga* II (1993), No. 2662.

⁶² Cf. [1982] NJA, 421.

⁶³ See *Regeringens* proposition 1985/86:83 p. 30. This reservation was however not completely respected in the *travaux préparatoires* of the Product Liability Act, see proposition 1990/91:197 p. 65-66 and cf. J. Hellner (*supra* note 42) p. 202.

no causation.⁶⁴ If a court has difficulties in putting the finger on the day when the limitation period begins in whiplash cases it might find it easier to say that the causality between the accident and the injury is not proved by the victim.⁶⁵ One cannot say that these problems are common in Sweden, but one can fear that they exist.

IV. Contributory Negligence

- 110** Before a change of the Act made in 1975 personal injury was compared with other kinds of damage as far as contributory negligence is concerned. The change meant a new thinking. Personal injury must be treated in a separate way. Mitigation is possible only if the victim is charged with having acted *intentionally* or *grossly negligently*. In cases of death the acting or omission of the victim can only affect right to compensation of the surviving relatives if the behaviour of the victim that contributed to the injury was *intentional*.
- 111** During the legislative process a surprise happened in the Parliament. Those who were linked to the temperance movement succeeded in making the Parliament adopt a rule according to which a mitigation also should take place when the victim had driven the automobile under the influence of alcohol, even if he had not caused the injury intentionally or through gross negligence. According to this rule a driver of an automobile whose driving did not seem to be influenced by (intoxication does not always mean that the automobile has been driving negligently) might have his *trafikskadeersättning* reduced or completely taken away. The acting of this wing of the Parliament came unexpectedly; the bill on which the Act was founded had never even discussed such a rule.
- 112** *The reasons* for the rule that mitigation is possible only if the victim is charged with having acted intentionally or grossly negligently (see. 110 above) were several. Most pronounced became the opinion that it is important to compensate personal injuries from a social point of view. Also humanitarian views were referred to. It was not considered to be reasonable that a person should be suffering, maybe during his whole life, because of an occasional fault. A better risk spreading was also achieved through the new rule. The liability insurance covers personal injuries in most cases, while one could not take into account that the victim had taken personal insurance. The inadequate belief in prevention also manifested itself. The victim was supposed not to be more careful only because he knew that his damages might be reduced if he himself was negligent; everyone tries to keep away from hurting himself irrespective of what kind of tort law rules that are valid. The rule about intoxication (see 111 above) was in conflict with these ideas.

⁶⁴ See [1982] NJA, 421, where a drug was considered not to have caused the injuries of several persons and where the question of a strict product liability might have been considered to be an unpleasant one to decide because of its strong effects to the industry.

⁶⁵ This is a hypothetical case, but see B. W. Dufwa, Whiplashskador, trafikförsäkring och preskriptionstidens inträde, [2001] *Svensk Juristtidning*, pp. 441-457.

- 113** The rule with reference to contributory negligence in connection with personal injury does not cover the case that the victim has failed to limit the *economic loss* of the personal injury. He or she is, for example, after having been injured, offered work that he refuses to take. This case is instead decided according to principles for how to calculate the size of the damages.
- 114** The Committee, on whose report the change of law is founded, was not satisfied with the idea that the reduction should only take place when the victim had acted intentionally or grossly negligently. The Committee also wanted an intermediary form. The judge should also be able to reduce the compensation when this was reasonable. The government, however, rejected this proposal, hardly supported by LO.
- 115** Contributory *intent* makes two situations topical. One is that the victim has consented to the injury. A doctor is, for example, permitted to perform a dangerous operation. Here, liability is not brought to the fore at all, since the act is accepted by the victim. The other situation regards suicide or attempted suicide. The Swedish Supreme Court decided such a case in 1981.⁶⁶ A driver proposed his fiancée, who sat at his side, that they should take their lives. She refused but he anyhow drove the car into a railing. Some minutes later he died in her arms. This was a clear suicide. Their son claimed for compensation from the traffic insurance of the car. The insurer was finally prepared to pay 75 % of the damages. The Supreme Court admitted 100 %, making the reservation that money would not have been paid out if it was clear that the driver had taken his life just because he wanted his relatives to receive a higher compensation than they otherwise would have been entitled to.

It has been supposed that behind this judgment lies a kind of view that is characteristic for social insurance (*cf.* above).

- 116** *Gross negligence* in connection with contributory negligence is rare in Swedish law. To have such a character, the negligence must be considerable. Typical is an act or omission that has also created big risks to others than the victim himself. Another situation concerns dangerous games, for example fencing without mask. There are also situations witnessing an obvious indifference to your own life and health, for example to balance on a balcony parapet that you know does not function.
- 117** The reduction is to be determined according to what is reasonable having regard to the degree of misconduct shown on both sides and other relevant circumstances.⁶⁷ This rule is the same as regarding property damage.

First of all it is the degree of fault that decides the judgment of what is supposed to be reasonable. It might happen that the contributory negligence is

⁶⁶ [1981] NJA, 920.

⁶⁷ Chapter 6, sect. 1, par. 3 the Damages Act.

considered to be so grave that the damages is reduced to zero. Inversely it might be that it is so insignificant that no reduction takes place at all. The reduced damages are normally fixed to a quota of the injury.

- 118** *Other circumstances* than the fault of the victim might influence the size of the damages. Important is the confidence in causality. The victim has a duty to limit the injury and if he has neglected this duty, he might have to accept a decision according to which he is responsible for that part of the injury himself. The courts have also paid attention to the fact that the activity of the tortfeasor was more dangerous than the one performed by the victim; a reduction of the damages has not then taken place as it normally should have been done.
- 119** Another circumstance that could influence the mitigation is the *economic* situation of the parties. The legislator has not meant that this rule should be applied too often. Instead it has been introduced to prevent clearly unreasonable results. An application of the rule is thought to be done essentially after the following. The judge tests the economic ground only after having examined the other circumstances. Then the judge asks if the mitigation so far found can be considered to be unreasonably hard for the victim. To be able to find this, the reduction must have serious consequences for the victim's possibilities to earn his living or for the conditions under which he lives. The principle is that economic considerations cannot result in a reduction if the victim is protected by personal insurance on his side. The same is valid if the victim is a self-insurer. It is presumed that the victim cannot avoid a reduction when he has omitted to take such a damage insurance that can be considered to be ordinary in his situation, for example to take out fire insurance for his home or his professional activity.
- 120** Nor is the result allowed to be unfair to the tortfeasor. It is never unfair when liability insurance covers the injury or when the tortfeasor can be considered to be a self-insurer. The same is the situation when the tortfeasor is an enterprise with a good economy or a municipality with sufficient resources.
- 121** So the good economy of the tortfeasor is never an independent reason for giving the victim full damages. The good economy might influence the decision but only when it has been established that a reduction would be unreasonable from the victims point of view.
- 122** Suppose that X's daughter A together with a friend B damages a valuable thing in the home of X. Suppose also that both A and B have been negligent in doing this. If X claims damages from B, B might ask for a reduction of the damages alleging that X must carry the negligence of his daughter A. This is perfectly true and in line with the Damages Act. One has to consider the act of A as if it was the act of X. By this reason X must accept a reduction of the damages. A condition for such an *identification* is, however, that it is a matter of property damage. If it had been a matter of personal injury – A and B had negligently injured X – a reduction could not take place. This is settled by the

legislator (see Chapter 6, section 1, par. 1 the Damages Act). So, also in this context personal injuries are treated more generously from the victim's point of view.

- 123** *Children* and persons who suffer losses under the influence of a *mental disease of deficiency* are also treated in a milder way than adults when it is a matter of contributory negligence. But this concerns mainly property damage. If a child goes cycling into the traffic without thinking twice and is injured it is difficult to think that a judge would reduce the compensation the child is entitled to from the insurer.

V. Recoverable Damages in cases of Personal Injury

- 124** Compensation made payable to a person who has suffered personal injury shall include compensation for: (1) costs of medical care, and other expenses, (2) loss of income, (3) suffering (non-pecuniary loss) (Chapter 5, section 1, par. 1 the Damages Act). Encroachment on a business activity shall be treated equally with loss of income (Chapter 5, section 1, par. 3, the Damages Act). The value of carrying out domestic work shall be equalized with income (Chapter 5, section 1, par. 2, the Damages Act).
- 125** Also persons who stand close to the victim – as husband, registered partner, cohabitor, children and parents – can have costs and other economic losses because of the injury such as travel expenses, income losses and costs because of care at home. Such losses have been paid according to court practice. But a condition has been that they can be considered to be losses of the victim; in this way the courts have avoided the problem that arises because the relative is a third party who the tortfeasor has no duty to compensate. During the first period (“akut sjukdomstid”) of the sickness the courts have been sufficiently liberal, but thereafter the attitude to pay such costs has been more restrictive. When the victim is a child or when the injuries are threatening the victim's life there will normally be compensation. In other cases the possibilities to get compensation for sick visits are small. After 1 January 2002 these possibilities, however, have increased after an intervention by the legislator.⁶⁸
- 126** *Non-pecuniary* loss is divided into three pieces in the Damages Act. It concerns compensation for physical and psychical suffering of a transitory character (“sveda och värk” which comes close to pain and suffering) or of a permanent nature (“lyte eller annat stadigvarande men” which means permanent disability or harm) and for special inconveniences (“särskilda olägenheter”).
- 127** With “*sveda och värk*” is understood suffering such as for example anxiety, difficulties to sleep or to concentrate, depression, sexual disturbance, uneasiness and worries concerning the future. These conditions have occurred during the time of the acute disease. Tables are used, which are established by the

⁶⁸ See *Regeringens* proposition 2000/01:68 pp. 20-21.

Traffic Accident Board (“Trafikskadenämnden”), a kind of half-official board to which the insurers in traffic accident cases, according to the law, have to address themselves in cases that are not less serious. The point of departure is a basic amount for every month; this amount can be raised dependent on special circumstances. “Sveda och värk” does not need to be proved through medical certificate.

- 128** After the acute disease there might be consistent consequences from the injuries: “*lyte eller annat stadigvarande men*” (see above). These are for example physical malfunctions, scars, lameness, loss of a part of the body, deafness, bad eyesight, impairment to the senses of smell or taste or potency. Here belongs also suffering because of the reactions from one’s surroundings and loss of the possibility to devote oneself to a holiday. Tables are used here too. They are built on the idea that every sickness can be graded from 0-100 %.

VI. Recoverable Damages in cases of Death

- 129** Where personal injury has resulted in the victim’s death, compensation is paid for 1) *funeral expenses* and, to the extent that it is deemed reasonable, other expenses resulting from death, 2) *loss of maintenance allowances* or other financial support, 3) personal injury which as a consequence of the death someone who stood in a *close relationship* to the deceased has contracted (Chapter 5, section 2, par. 1, point 3 the Damages Act).
- 130** Infringement compensation (see 74 above) might be paid to those who stood in a close relationship to the deceased.

VII. Extent and Means of compensation

- 131** There are no *thresholds* or *caps* in the Damages Act. In the alternative compensation systems (see 21-65 above), however, there are and there might also be such limits in the legislation concerning pure strict liability (as for example in the nuclear field).
- 132** The amount of damages for non-pecuniary loss is to a large extent *standardized* through tables given every year by the Traffic Accident Board (“help tables”).
- 133** Regarding “*sveda och värk*” (see 127 above) there is first a basic amount for every month. A distinction is made between “sveda och värk” during the time spent at hospital and treatment outside the hospital. For the first three months after the accident the amount is higher than for the following three months: still lower is the amount for the next three months. The basic amount might be raised by 10-50 % when circumstances give occasion. Such circumstances are explained in another table.
- 134** “*Lyte och men*” (see 128 above) is compensated according to another table, where the important facts are the degree of disability and the age. The degree

of disability is fixed through a percentage share for different kinds of injuries, for example 60 % where the injury has resulted in an amputation of the forearm and 25 % concerning amputation of the thumb.

- 135** Compensation for future loss of income, or future loss of maintenance allowances or other financial support shall be fixed in terms of a *life annuity* or in terms of a *lump sum*, or in terms of a life annuity together with a lump sum (Chapter 6, section 4, par. 1, clause 1 the Damages Act). This means that the victim can do as he wants. However, there is a limit. If the compensation is of essential importance for the support of the person suffering the loss, it shall be fixed in terms of a life annuity, unless there are special reasons against it (Chapter 6, section 4, par. 1, clause 2 the Damages Act). This is a peculiar limit, because it is said in the *travaux préparatoires* that it does not result in any limitation of the freedom of contract.⁶⁹ The Act also prescribes that if the victim wants to change a life annuity into a lump sum, he is free to do that but only if he can refer to “particular reasons” (Chapter 6, section 4, par. 2 the Damages Act). If the victim wants to buy a residence or to begin course of study, a change into a lump sum is considered a particular reason. The need for money because of tax reasons is not considered to be “particular”.⁷⁰
- 136** After the issue concerning compensation for personal injury has been decided finally through the conclusion of a contract or through a judgment, the conditions on which the decision was taken might have changed. If this change is essential, the whole question of the assessment of the damages might be *re-viewed*. This means that the level of compensation can be raised or reduced. Lump sums can however never be changed (Chapter 6, section 5, par. 1 the Damages Act).
- 137** Changes of the *money value* are taken care of by the legislator.⁷¹ The efforts are however only directed to life annuities.

VIII. Importance of third party liability insurance for the victim⁷²

- 138** There is only one type of *mandatory* liability insurance in private life: traffic insurance. For some categories of professional activity there is a demand for mandatory liability insurance. Two such professions are real estate brokers and insurance brokers.
- 139** There are also professions where the activity presupposes a mandatory liability (this is asked for by organisations to which they must belong to be authorised), although the law does not. This is for example the case with solicitors.

⁶⁹ *Regeringens* proposition 1975:12 pp. 112 *et seq* and 166 *et seq*.

⁷⁰ *Regeringens* proposition 1975:12 pp. 167 *et seq*.

⁷¹ *Lag* (1973:213) *om ändring av skadeståndslivräntor*.

⁷² Cf. J. Hellner, *Tort Liability and Liability Insurance, Scandinavian Studies in Law* (1962), pp. 128-162.

- 140** A direct claim from the victim against the insurer is not allowed. However there are rules set that shall press the insurer as well as the insured. The insurer cannot pay compensation to the insured before the victim has been compensated by the insured or before the victim has given his consent. If this rule is broken by the insurer, he will be responsible to the victim. Another rule stipulates that if the insured has a right to compensation from the insurer but refuses to do anything in this way, the victim is entitled to sue for a distraint regarding the insured's right to compensation from the insurer.
- 141** The right to sue for a distraint does not exist when the insured is in bankruptcy. Nevertheless the insured then has a sum of money still due to him, even if he cannot take it out without the consent of the victim. According to the law the official receiver then has to arrange that the victim gets his compensation. However, there is a special condition that has to be fulfilled for this. The insured's right to compensation from the insurer must have come *before* the moment that the bankruptcy occurred.

Part II. Cases

Case 1

a) Costs

- 142** P is entitled to compensation from the mandatory traffic insurance of the lorry (or, when impossible to identify the lorry, from the bureau of traffic insurance) for the costs of his medical treatment. Compensation is given after a judgment of what is the reasonable cost. It is impossible to say anything in general about how this judgment is done, but hereditary facts are supposed to play a role to a certain degree. From the compensation is automatically reduced what he receives from the social insurance. He will get 69 % of the "prisbasbelopp", an amount fixed every year by the government to be able to do the calculations that are done in the Act on General Insurance (*Lag* (1962:381) *om allmän försäkring*). For the year 2001 this amount is 39,600 SEK = €4,298⁷³. The relatives of P are entitled to compensation for pecuniary as well as non-pecuniary damages (see 129-130 above).

b) Loss of income

- 143** A somewhat peculiar calculation has to be done. Would it have been possible for P to be a doctor? An analysis of his school report as well as other circumstance, among them the profession of his parents, has to be carried out. If the result is that P would not have been able to be a doctor, the insurer will have to find some other appropriate profession.
- 144** If the insurer finds that P could have become a doctor the insurer will give him €60,000 for the beginning of his career, €200,000 for the end of it, pro-

⁷³ As of 13 July 2001.

vided that this is considered to be reasonable. It would be considered unreasonable to give him €500,000 .

- 145** The income loss does not begin till after school and 4-5 years studies in medicine. Finally his income loss will be reduced with compensation from social insurance. During his academic studies some money will come from the state. This money is also reduced from the income loss that will be paid by the insurer.

c) Relatives

- 146** The relatives will not receive anything from the insurer. But they will be compensated from the social insurance, provided that they are staying at home to take care of P.

Case 2

- 147** a) Patient insurance will pay (see above). It does not matter where the accident occurred.
- 148** b) If P does not succeed in getting anything from the patient insurance, she will be referred to social insurance and her own private insurance.

Case 3

a) Claims of the widow and of the daughter?

- 149** The practice of Swedish traffic insurers is that the *widow* receives about 50 % of the common income of the spouses. This means that the widow here will get €10,000 monthly. It is supposed that the widow finds some kind of work, moves to a smaller apartment and things like that to be able to reduce the costs. If she does not the insurer will reduce her compensation correspondingly. No special compensation will be given concerning holiday more than during the time she needs to find a new job (which might take a long time).
- 150** From what the widow thus receives, the traffic insurance will make a reduction with the benefits according to Chapter 5, section 3 of the Damages Act (see above under 18 above).
- 151** The *daughter* will receive a special “child pension” from the social insurance. Insurance till 18 or even 20 if she studies and is talented.
- b) Consequences of S’s contributory negligence?
- 152** None. Only if the accident is a result of a suicide will there be a reduction.