

Channeling in Tort Law

by

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A. Introduction

1. Channeling in compensation law means drawing the liability from a subject who according to normal rules should be liable, and instead placing that liability on another subject. A concentration takes place.¹ This radical way of developing tort law conflicts in a dramatic way with the traditional patterns of compensation law. When the liability of multiple tortfeasors is brought to the fore and the application of normal rules lead to liability for each of them, the liability in principal is joint and several (solidarity). Such a liability is a holy principle of tort and contractual law and was the subject of studies and analysis already in Roman law. Channeling implies that the principle of solidarity is completely broken down. How is this done?

2. It is not easy to give a general answer to this question. The development of channeling in compensation law runs a number of different courses, and the methods of channeling are many. There are, however, three main paths one may take. The first implies that the rules are changed by the legislator or judge in relation to normal tort law rules and principles (legal channeling, see B below). The second one is a paradox: channeling is simply carried out, yet by doing nothing (economic channeling, see C below). The third path sees voluntary forces create a change of the normal rules and principles (agreement channeling, see D below).

¹ The situation is not the same if the liability of more than one tortfeasor rests. A concentration takes place also here, but it is not the same as when only one tortfeasor takes all the liability. Therefore it is best to use the term channeling for this situation.

B. Legal channeling

3. Legal channeling can take place through the *conditions of liability*. Suppose that A and B have caused damage, and that both of them should have been liable according to regular tort law rules. Channeling made by the legislator would imply that A but not B (or vice versa) would be held liable. The power to adopt special rules violating the normal rules where this is considered to be appropriate, rests primarily with the legislator. The authority of the judge in this context is more problematic. An openly performed channeling is one thing.² If the judge on the other hand “conceals” the channeling there is no basis for certain conclusion. Let us look at the following example: According to normal principles, where A has caused the damage by gross negligence, and B by slight negligence, then both are considered liable. Attention can be paid to the inequality between the actions of the tortfeasors in the frame of the recourse action that normally takes place after one of them having considered that he has paid too much to the victim. If the judge in stead wants to channel the liability – and in fact does – he could find that B was not negligent at all (i.e. that B was not even slightly negligent) and that A is therefore solely liable. Who can then criticize him for keeping the channeling in the dark or concealed in this way?

4. Another way of channeling is to work through the *recourse action*. A and B have both caused damage to X, and both are also considered liable. If A has paid the whole amount of compensation to X, he is entitled to claim for compensation from B through a recourse action according to normal rules. However, the legislator or the judge might for one reason or another wish to channel the liability to A; an example could be that A is an insurer. This can be done by refusing A the right to reclaim compensation from B in recourse. Regarding the recourse action the legislator is also not prevented from channeling. As far as the judge is concerned, there is also a difference in the recourse actions between open and concealed. The concealed is problematic, yet probably real. Suppose that the judge has not channeled the liability in the case mentioned above under 3. Both A (gross negligence) and B (slight negligence) have been declared liable. Later, in the recourse action, another judge finds a channeling appropriate. Comparing the negligence of A with the one of B he finds that B’s negligence is so unimportant that he refuses to approve the action of A against B. If nothing is said by the judge the channeling is hidden behind the assumption that the operation that has taken place is the result of a normal apportionment of the liability between A and B.

5. A specific form of channeling through the recourse action is the prohibition placed on the social security (or: Swedish state) from reclaiming compensation for expenses paid under the social security from those deemed liable according to normal rules.³ Those released from liability will in any event in the end have to pay a part of the burden through taxes, although this amount is microscopic compared to the amount that would have been due according to normal rules. At the same time, the spreading of costs is so forcible that it is doubtful if one can say that the liability is concentrated (see 1 above).

C. Economic channelling

6. Channeling might be created without any change of the rules at all. If the victim is able to claim compensation from A or B, he might prefer A because the chance for success is much higher than against B. Economic channeling is an instrument for developing tort law that normally is in the hands of the legislator. It is of great importance, when new compensation systems are built up. The legislator may want to realize a complete channeling by making A solely liable. Yet for one reason or another, he finds that it may be advantageous to let the liability of B stay although or because he knows that the liability of B will not be utilized by the victims. An example is provided by the Swedish law concerning traffic accidents. The mandatory traffic accident insurance (A) is here made directly liable for personal injuries.⁴ Many circumstances, not at least international conditions, made it safer for the legislator to let the liability for fault remain with the driver, owner **or someone else (B)**. The legislator was fully aware of the fact that B’s liability would only be referred to by the victim in rare cases. It was easier and more effective to claim for compensation from the insurer (A) charged with a strict liability, than from B who was imposed with a fault based liability. The following development proved that this was a correct assumption. The result of this economic channeling is a transfer of the financial burden of personal injuries in

² See G below.

³ The prohibition is prescribed in Chapter 20, Section 7, par. 2 the Social Security Act (lagen om allmän försäkring (1962:381)). And is the same concerning work injuries covered by the Occupation Injuries Insurance (lagen om arbetsskadeförsäkring (191976:380)), see Chapter 6, Section 7 of the Act. The prohibition was discussed by a parliamentary Committee (Personskadekommittén) in a bill, published in 2002 (Samordning och regress. Ersättning vid personskada. SOU 2002:1. [ISBN 91-38-21575-6]). The majority of the Committee was of the opinion that the prohibition should stay. The issue is today, together with other questions taken up by the Committee, still treated by the Ministry of Justice.

⁴ This is so also concerning some kinds of property damage caused by the motor vehicle.

traffic accidents from drivers and others who have participated in the accident through fault, to the motor vehicle owners paying premiums for the mandatory traffic accident insurance.

D. Agreement channeling

7. An example of agreement channeling is where employers, vicariously liable for damage caused by their employees in the course of their employment, agree to transfer their individual liability to a common liability insurance, at the same time as a prohibition to claim for compensation from the individual employer becomes a deal of the understanding. Such an agreement can be made through a collective agreement (see K below).

E. The contrary: loss spreading

8. Channeling is the opposite of spreading the liability. In this regard, channeling has a heavy task. The gospel of spreading the risk has since made its entry into tort law, and is difficult to shake. And as a matter of fact, the idea of loss spreading has even entered into the field of channeling where the liability might be placed on a subject that has better possibilities to distribute the losses than another one, whose liability is therefore repressed.⁵

There are clear statements in international tort law doctrine indicating tendencies towards widening the scope of liability. In Atiyah's "Accidents, Compensation and the Law", the chapter entitled "Defendants: Part I"- following an analysis of the situation where the wrongdoers are employees or companies - went on to say:

*"One lesson which might be deducted from all this is that multiplication of possible defendants often does good, and rarely does harm. The more possible defendants there are in law, the greater is the chance that one of them will be able to compensate the plaintiff, or will be insured; whereas if none is in this position no great damage is done because several impecunious defendants can no more be ruined than one".*⁶

Even the assertions of more traditionally minded legal theorists can run along the same lines. Extended liability will usually be "mitigated" in a sense by mere reference to the possibility of recourse between the wrongdoers; the border between the conditions of liability and joint or several liability in this way becomes blurred. For an example of this, we can refer to the argumentation exacted by Bianchi, a Swiss environmental law expert. Bianchi criticized a number of his Swiss colleagues' propositions that sought to free a person from tortious liability for harm caused by another individual's intervening action:

*"Nous l'avons déjà souligné, un accident n'est que rarement le résultat d'une seule cause. La rupture de la chaîne causale ne doit être admise que parcimonieusement. Le défaut est bien réel, il n'est pas du aux agissements d'une tierce personne comme dans l'hypothèse précédente et le propriétaire doit en répondre. Il a néanmoins la possibilité de se retourner contre un tiers responsable pour une part du dommage".*⁷

Certain German legal theorists provide another example, characterizing the development in the area of environmental harm under German law:

*"Im Bereich der Umwelthaftpflicht ist man daran, nach dem Vorbild der US-amerikanischen "marketshare liability" die Haftung für summierte Immissionen und addierte Teilkausalität zu bejahen. Ansatzpunkt hierfür ist eine exzessive Interpretation der Solidarhaftung gemäss [para. sign] 830 I 2."*⁸

9. In 1961, Paul Esmein stressed that the search for an individual liable in tort - "cette recherche a tout prix d'un responsable"- had become an active one.⁹ He may have been referring primarily to cases involving only one wrongdoer. The statement does, however, also cover cases involving multiple wrongdoers. The international materials on the whole seem to reveal a tendency in certain areas of imposing liability on as many individuals as possible. This tendency is most apparent in America, but appears also in other quarters.

⁵ See for example what is said about agreement channeling under D above and K below.

⁶ P.S. Atiyah, Accidents, Compensation and the Law, 1st ed. London 1970 p. 219-220. The words are the same in P. Cane, Atiyah's Accidents, Compensation and the Law, 4th ed., London 1987, p. 219-220.

⁷ F. Bianchi, Pollution atmosphérique et droit privé. Étude des moyens d'action contre la pollution atmosphérique en droit privé. Lausanne 1989. P. 208.

⁸ T. Honsell & F. Harrer, Schaden und Schadensberechnung, Juristische Schulung 1991 p. 442.

⁹ Peine ou réparation. Mélanges en l'honneur de Paul Roubier, doyen honoraire de la Faculté de droit et des sciences économiques de Lyon, correspondant de l'Institut. Tome II. Droit privé, propriété industrielle littéraire et artistique. Paris 1961. P. 42.

10. It is possible that the importance of distribution in modern tort law has contributed to the very restricted international debate of channeling in tort law.¹⁰ However, in Sweden, a country with a reputation of being “a laboratory of insurance”, this way of mastering tort law has been generally accepted by the legislator. One field in which this can be clearly seen is the one regarding work injuries. Since the aim of this article is to bring a tribute to Reinhold Fahlbeck, an international authority on labor law, it seems important to put the spotlight on the development of channeling regarding this part of Swedish law. Some words, nevertheless, should first be said about the origin of channeling: nuclear compensation law.

F. Nuclear compensation law

11. The possibilities of applying tort law rules in such a way that the liability is concentrated to one subject have always been there, and most likely also been used (*cf.* A above). However, the first time that definite rules built on principle concerning channeling were adopted was through the creation of nuclear compensation liability. The rules, internationally anchored in conventions,¹¹ were spread all over the world. A strict liability was imposed on the one who was in charge of the nuclear station (the “keeper”). The liability for others who had contributed to damage by way of fault – particularly main suppliers and subcontractors, and sea, land and air transporters of nuclear substances – was in principle eliminated by the legislator. This way of developing the law was far from self evident. In Western Germany the manner was considered to be in conflict with the constitution; it therefore ought to be rejected.¹² Resistance of this kind has also existed in other countries.¹³ It has nevertheless not been able to stop the idea of channeling in the nuclear field.

12. Channeling of this kind finds an obvious context in the issue of the size of the damages and with insurance conditions. In order to protect themselves against a fault based liability of the size here in question, other subjects than the keeper should be forced to take out liability insurance. The premiums should amount to large sums. A normal premium cost for a nuclear station has been considered to be somewhere between seven and fifteen per cent of the sum insured. If everyone risking a liability was forced to take out liability insurance of this kind, nuclear power would become more expensive, and the development of the nuclear energy thus hampered. Given this situation, it has been considered most appropriate to channel the liability to one subject – the keeper of the nuclear station. For the equation to match, this liability has to be guaranteed. This is done primarily by imposing a strict liability that consumes the fault of others. Then the keeper is obliged to take out liability insurance.¹⁴

13. The nuclear legislation contains a complicated compensation system. Ulf Nordenson, who represented Sweden in the international legislation work in the field, went on to become a tort law expert of the first rank. In the negotiations that preceded the conventions, it is highly probable that he successfully influenced the shaping of the system. Nordenson perceived in this system something quite new for tort law in general. According to him, the work had forced lawyers from all countries to radically reconsider the traditional views on the goals and means of tort law. He found that much indicated that the new orientation which had taken place in the nuclear field in the long term could be the point of departure for a sweeping change in tort law concerning damage caused by industrial activity.¹⁵ And he went further still: The nuclear liability legislation might render its biggest service by “being a gateway for a tort law reform according to more radical but also more rational outlines than those which many centuries ago had been staked out in the Roman law’s *Lex Aquilia*.”¹⁶

14. According to Henry de Montherland every great man acts and writes only to develop two or three ideas.¹⁷ To Nordenson the idea of channeling became his perhaps most important contribution to the development of tort law;¹⁸ and regarding the great influence and activity that he exercised during his life in the tort law field this is not

¹⁰ In Europe a vivid discussion took above all place in Western Germany in the sixties and the seventies. See for example some monographs: Belsler, *Atomversicherungsrechtliche Fragen unter Berücksichtigung der internationalen Konventionen*, Göttingen 1963; H. Kanno, *Gefährdungshaftung und rechtliche Kanalisierung im Atomrecht. Ein Beitrag zur Dogmatik des Schadenshaftung*. Mit Bericht vom 31. Kolloquium des Instituts für Energierecht an der Universität zu Köln über Fragen des Energierechts vom 1. Dezember 1966: „Die Pariser Atomhaftungskonvention und das problem des ausschliesslichen Haftung des Inhabers von Kernanlagen.“ Düsseldorf 1967; P. C. Mohr, *Die Kanalisierung der Haftung unter besonderer Berücksichtigung des Atomrechtes*, Berlin 1970.

¹¹ The international collaboration in the field of nuclear law began more seriously in the middle of the fifties. In 1960-1964 the work, driven by European Nuclear Energy Agency, European Atomic Energy Community and the International Atomic Energy Agency, resulted in not less than four conventions.

¹² Cf. Pelzer, *Die rechtliche Kanalisierung der Haftung auf den Inhaber einer Atomanlage – ein juristischer und wirtschaftlicher Fehlgriff*, *Versicherungsrecht* 1966, pp. 1010-1014 and Fischerhof, *Das Problem einer dogmatischen Begründung der rechtlichen Kanalisierung der Haftung auf den Betreiber einer Kernanlage*, *Versicherungsrecht* 1966, pp. 601-604.

¹³ See Mohr, in note 10 *op. cit.* pp. 11-12, 103-104 with further references.

¹⁴ *Op. cit.* pp. 34-35.

¹⁵ U. K. Nordenson, *Svensk och internationell atomansvarighetslagstiftning*, *Svensk Försäkrings-Årsbok* 1968, pp. 31-53.

¹⁶ *Op. cit.* p. 53.

¹⁷ H. de Montherland, *Carnets*.

¹⁸ Cf. B. W. Dufwa, *Rättsstridighet och det europeiska harmoniseringsarbetet i skadeståndsrätten*, *Festskrift till Ulf. K. Nordenson*,

to say little. As secretary of the Committee¹⁹ authorized in 1949 by the government with the aim of creating a new Damages Act, Nordenson was put in a position to utilize his experience of channeling from an early stage. During the years up until the Act²⁰ was finally adopted in 1972, he worked in close connection with the legislative work, finally as a permanent undersecretary of the State. In this regard, it is hardly coincidental that the Act bears clear traces of the channeling idea. This is most evident in the part of the Act concerning work injuries. Here, all three kinds of channeling (B-D above) exist

G. Legal channeling: employee liberation

a. The comprehensive view

15. For the first time in Swedish law, general provisions regarding the liability of the employer and the employee were adopted in the Damages Act. In the third chapter (Section 1), the employer was made liable for damage caused by the fault of an employee in the course of his employment.²¹ Thus the legislation introduced a kind of liability for the conduct of another individual.²² At the same time special rules concerning the liability of the employee were elaborated. They were placed in the fourth chapter (Section 1) of the Damages Act.

16. The rules provided no torso. They were complete, characterized by an exceedingly well thought out system that was dominated by a comprehensive view. True, the liability of the employer was not prescribed in the same chapter as that containing the rules concerning the employee's liability, but this split was a technical necessity that has not been able to remove the impression of well complied provisions.

17. The comprehensive view is particularly apparent in three regards. Firstly, the employer and the employee have been merged in such a way that one can say that the employer has been *identified* with his employee. Secondly, the system has been built on clear aspects of *insurance*. Thirdly, the system is characterized by a *channeling* of the liability from the employee to the employer.

18. In the first two regards – identification and insurance – one can trace corresponding trends in other countries. The idea of identification can, with a little good will, be said to characterize most countries' view on the liability of the employer. The fact that an employer can protect himself by taking out liability insurance is often the explanation why his liability has been extended so far as to cover also the acts of another; however, the main rule is that one is only liable for one's own acts and omissions. Apart from Sweden, such a more deliberately performed channeling of the liability would prove more difficult to find.

b. Employee: liberation of liability

19. The channeling has not been performed in the way that the liability of the employee will always be set aside. Instead the liability has been significantly reduced, not at least because the employee normally cannot find an insurer who can offer him a liability insurance. The main rule is that the employee has no personal liability at all. Yet as can be seen from Chapter 4 Section 1 of the Damages Act, liability may only be imposed when there are "particular reasons" for this:

*"An employee shall be liable for damage caused by his or her fault done in the course of employment only if and to the extent that there are particular reasons for such liability, having regard to the nature of his or her act or omission, the employee's position, the interest of the victim and other circumstances."*²³

20. Two situations are brought to the fore when an employee is personally claimed for compensation by the victim. They are considered to be somewhat different. The claim may come from the employer who now wants to

,Stockholm 1999 pp. 75-96, 93-94. [ISBN 91-7223-055-X].

¹⁹ Called "Skadeståndskommittén".

²⁰ Skadeståndslagen (1972:207).

²¹ Section 1 par. 1 prescribes: "Any person who has another person in his employment shall be liable to pay compensation for
1. personal injury or property damage caused by fault of an employer in the course of his employment,
2. pure economic loss caused by a crime committed by the employee in the course of his employment, and
3. infringement because the fault caused by the employee in the course of this employment has violated some one else in the way noted in Chapter 2 Section 3."

²² To a restricted extent, however, this liability had already been adopted in case-law.

²³ In Swedish: "För skada, som arbetstagare vållar genom fel eller försummelse i tjänsten, är han ansvarig endast i den mån synnerliga skäl föreligger med hänsyn till handlingens beskaffenhet, arbetstagarens ställning, den skadelidandes intresse och övriga omständigheter."

reclaim compensation he has paid to the victim back (see 1 below), or the claimant is the victim – other employees or outsiders – making a direct claim for compensation (see 2 below).

21. Chapter 4 Section 1 the Damages Act will also apply if the employer causes damage to the employer directly. Since this is not a case of multiple tortfeasors the question of channeling never arises.

1. Claims against the employee from the employer

22. Normally, the victim will turn directly to the employer with his claim for compensation. If there are “particular reasons” for the employee to be liable, the employer then can reclaim what he has paid to the victim from his employee, but only to the extent that the employee is liable (see the text of the Act under 19 above).

23. The degree of the fault caused by the employee becomes important when deciding what is meant by “*the nature*” of the act or omission (see the text of the Act under 19 above). The employee is treated less advantageously when he has caused the damage intentionally or has been grossly negligently. A rule discussed in the motives of the Act was whether an employer should always have the right of full compensation when the employee had caused the damage intentionally, grossly negligently or whilst under the influence of drink. This was, however, rejected by the Minister of Justice. In some such cases the liability of the employee ought to be reduced or completely disappear. Furthermore, even when the fault was less important than in the cases mentioned, one could not rule out that compensation could be claimed successfully where other factors spoke in favor of this.²⁴

24. When considering “*the employee’s position*”, punishment does not automatically imply liability. One circumstance to be considered is whether the employee was a part of the management, or operated under a special task but betrayed the employer’s confidence.²⁵ Also the influence he had in the enterprise could be of importance when deciding the employee’s position. “*Other circumstances*” denotes, amongst other things, the economic conditions of the employer and the employee. The former might have gone bankrupt while the employee might have a fortune; “particular reasons” might then motivate making the employer liable to a certain extent.²⁶ If the victim is in a good financial position, this might speak in favor of liability not arising. According to the motives, compensation should not be paid for property damage if the victim has failed to take out “ordinary” property insurance. And inversely, the absence of a liability insurance taken by the employee – due to special circumstances - might be a reason for rendering him liable.

2. Claims against the employee from other employees or outsiders

25. In the case where a victim – other employees or outsiders - makes a claim against an employee, the same rules and principles are applied as regarding the employer’s recourse action; if there are “particular reasons” for the employee to repay the employer what he has paid to the victim, then there is also a duty to pay damages directly to the victim. However, a divergence might exist in this case: the victim might have been unable to completely make use of the liability of the employer. One reason for this might be that the employer is insolvent, or that his liability has been mitigated according to other rules of the Damages Act. In this situation, the motives of the Act state that regard must particularly be paid to the “*interest of the victim*”.²⁷ This implies that the liability of the employee might be assessed more rigidly than his liability against the employer (see 22-25 above).

26. Where the employee has paid compensation to the victim in a case where the employer is liable according to Chapter 3 Section 1 (see 15 above), the employee has the right to be compensated by the employer. In this situation the employer must be charged with as much of the financial burden as he, after having paid the victim, would have been obliged to answer for in the recourse action against the employee (see 22-25 above).²⁸

3. Pure economic loss

27. Special considerations are called for regarding an employee’s liability for pure economic loss. The issue arises in three situations. In the first, the employee directly has caused the employer the loss by not respecting the employment contract.²⁹ The second situation concerns the case where the employee’s action or otherwise have caused that the employer not to be able to fulfill his obligations under a contract.³⁰ In both these situations the employee is liable without being guilty of a crime. In the third situation, however, the employee has committed a crime, something that can cause damage to the employer as well to a third party. Chapter 4, Section 1 the Damages Act applies in all these three cases.³¹ It might seem odd that this regulation also covers the last case, but the Act

²⁴ See proposition 1972:5 p. 409.

²⁵ Betraying the employer’s confidence after having operated under a special task can also be regarded as a question falling under “the nature” of the act.

²⁶ See to the following proposition 1972:5 p. 557-560.

²⁷ See proposition 1972:5 p. 411.

²⁸ See proposition 1973:5 p. 412.

²⁹ See proposition 1973:5 p. 560.

³⁰ See proposition 1973:5 p. 557.

³¹ The last situation (crime) is regulated in Chapter 3 Section 1, 2. See in not 21 above.

explicitly mentions this one.³² In the motives the case is mentioned in which an employee is guilty of complicity in the crime of not keeping accounts. In such a situation the circumstances might, particularly in relation to the responsibility of the highest management, be hard for the employee and a mitigation of the liability to pay compensation thus called for.³³

H. Legal channeling: employer liberation (pilots)

28. Pilots are normally employed by the state or a municipality. Although this is the case, it is an international principle that neither the state nor the municipality will be liable vicariously as employers for damage caused by the pilots. In order to respect this principle, the authors of the Damages Act therefore made an exception for this kind of damage from the ordinary rules regarding employers' liability. The legislator, waving his magic wand, therefore prescribes in Chapter 3 Section 9 that liability according to Chapter 3 does not lie with the state or the municipality when a damage has occurred due to piloting faults.³⁴ The victim has not, however, been abandoned. According to Chapter 7 Section 1 of the Swedish Marine Act, the ship-owner has the liability of an employer for damage caused in the course of employment. Obviously the legislator here has channeled the liability of the employer to the ship-owner.

I. Legal channeling: who is the employer?

29. An example of channelling as made by *courts* is the following, as taken from Swedish jurisprudence: Plumber (B) with no employees had promised a villa owner that he would install piping in his garden. To be able to do this, B hired an excavator with a drill (C) from an enterprise (A). Who was the employer of C?³⁵ A or B?

30. The Supreme Court interpreted the motives of the Damages Act in such a way that the liability of an employer should not to be shifted from the original employer where the lending was of a fairly insignificant duration, and was done in favour of an enterprise that in its activity did not keep own employees busy.³⁶ The court also referred to clear statements made by the legislator when the employer's liability was adopted. According to these, an unbiased balancing of the employer's and the victim's respective positions and interests normally rendered the result that the employer was closer to carrying the economic consequences than the victim. What is more, the employer had in any event a possibility to protect himself by taking out liability insurance. He could also let his cost calculations cover the premiums, thereby wholly or partially transfer these costs to a greater collective. According to the court, the possibility of insurance and of calculating the premiums in the costs of the whole activity was a point of view that in a natural way could be applied to the lender in this case. In relation to B, this point of view was, according to the court, "reasonably far-fetched and unpractical". The employer's liability was considered to have remained with A.

J. Economic channeling: employer liberation (traffic accidents)

31. A special channeling regulation was adopted in the Damages Act concerning the liability of the employer when his employee intentionally or negligently and in the course of his employment causes a traffic accident whilst driving a motor vehicle. Here the mandatory traffic insurance, a liability insurance, in principle covers all injuries and also property damage to some extent. The liability of the insurance is strict. For all other subjects, the liability rests, but it is built on the fault principle. This means that the victim normally will prefer to claim compensation from the insurance, not from the driver or owner of the vehicle or other subject that only are responsible if they have caused the damage by fault. Although there is no legal channeling, the liability is, in reality, channeled.

32. One can understand why the victim in this situation would have little interest in claiming compensation from other subjects than the traffic insurance. But what about the interest of the insurance itself in reclaiming compensation paid out from the employer? There might of course be such an interest, yet to permit actions against the employer was considered to result in an even more complicated system of rules than the already complex traffic accident law.³⁷ For this reason, the liability of the employer was eliminated and instead channeled to the traffic

³² See note 22 above.

³³ Meaning that there might be an inequality between the management and the employee concerning economy but also regarding the fault, cf. what is said under No. 3 above. See proposition 1972:5 p. 433.

³⁴ If the damage occurred outside of the piloting, the state or the municipality might well be liable as an employer.

³⁵ NJA 1979 s. 773.

³⁶ According to the motives of the Damages Act, the question should firstly be decided with the point of departure in a judgment concerning which of A or B most closely exercised the control of the employee and who led the work. However, this guideline was not valid in all cases of lending labour, *only* in such cases where the employee factually had been incorporated into the activity of the other enterprise in a way that he or she outwards is considered to be wholly on an equal footing with the actual employees of this enterprise.

³⁷ See B. Bengtsson & E. Strömbäck, Skadeståndslagen. En kommentar. Stockholm 2002. P. 115 [ISBN 91-38-50531-2].

insurance. The burden of paying for injury and damage in this situation is thus transferred from the employers to the owners of motor vehicles through their obligations to pay premiums of the mandatory traffic accident insurance.

K. Agreement channeling: employer liberation (individual liability)

33. As have been seen (see G above), the liability for work injuries is normally channeled to the employer, whilst the employee correspondingly is liberated from all responsibility. Another step in the development of channeling in this field would be to liberate not only the employees but also the individual employer from liability. Apart from the obligation to pay a premium, such a liberation for the individual employer could be realized by creating a liability insurance to be taken out by all employers and which directly (and not through the employer and employee) is based on a strict liability. For the victim, such an arrangement would be more advantageous than the employers' liability as set out in Chapter 3 Section 1 (see 15 above), since the latter requests the victim to prove a fault of the employee.

34. A development of this kind has taken place in Sweden through a voluntarily shaped insurance, called the Industrial Injuries Insurance.³⁸ This insurance is built on a collective agreement between the two big players of the labor-market: The Swedish Employers' Confederation³⁹ and the Swedish Trade Union Confederation.⁴⁰ The agreement is in favour of those employees who are injured in the course of their employment, but has the disadvantage of not covering the liability of an employer who is not connected to the collective agreement. Since the inception of the insurance, the rules of Chapter 3, Section 1 the Damages Act based on the fault principle have, to a very large extent, lost its practical importance. They are applicable for two categories of victims: employees who do not working for an employer bound by the collective agreement, and those who are not employees at all (third parties).

35. The Industrial Injuries Insurance went into force on 1 January 1972.⁴¹ The origin of the insurance is said to have been the experience of the stevedores: they often encountered difficulties in obtaining compensation from the owners of foreign ships. The employers, however, could not have been uninterested in the reduced possibilities of spreading information about the accidents that was provided through the insurance. Since the insurance is private the right-of-access principle – of great importance in Sweden – does not apply. Long and trying disputes are escaped and replaced by a comparatively quick claim settlement, important for the rehabilitation of the injured employees. Having originally only been in favour of stevedores and roof- and metal workers, the Industrial Injuries Insurance was successively spread to finally cover nearly the whole trade and industry.

L. Final remarks

a. The limits of spreading

36. Without doubt, spreading of the risk is a very important goal of the rules concerning tort law. The legal policy evaluation behind the spreading of liability, however, has seldom been discussed explicitly. One has to weigh the real needs of having as many liable parties as possible against both the advantages thereby gained by the injured party and the individuals liable in tort, and the disadvantages of having several recourse seekers. Costs are incurred by both the parties and society at large – waste is the cancer of compensation. Where you have one liable individual, you should not place a second, a third and a fourth separately, but rather view them as constituent parts of the same unit. The apportionment of damages within this unit should then take place on a rational basis.

The possibility of increasing the sphere of liability can not be driven past certain limits either. Sooner or later one will reach the point where it will appear necessary to delimit the number of liable individuals, and where there is cause to raise the question how such a tightening-up - a concentration of tortious liability - should be carried out. Channeling plays an important role in these efforts. The Swedish rules regarding the liability of employers and the employees for damage caused by fault of the employees in the course of their employment offer a perfect example of channeling in a special field, here work injuries. The model might also be transferred to other fields and to many issues of tort law.

b. Harmonization of European tort law

³⁸ Trygghetsförsäkring vid arbetsskada (TFA).

³⁹ In Swedish: Svenska Arbetsgivarförbundet (SAF). Later this association has changed its name to: Näringslivet

⁴⁰ In Swedish: Landsorganisationen i Sverige (LO).

⁴¹ About the insurance as it was understood in 1974, see J. Hellner, "Geborgenheitsversicherung" – eine neue Stufe in der Entwicklung des Arbeitsunfallschutzes in Schweden, Festschrift für Ernst Klungmüller, Karlsruhe 1974. Pp. 159-171.

37. This is not least the case regarding the efforts to create a European tort law. Channeling is a perfect instrument to achieve the kind of concentration that is necessary to accomplish harmonization in the legal field. From this point of view, and with regard to the European integration, exclusive rules are better than alternative ones. In the only sphere where the European Community has succeeded in adopting a tort law directive, namely the field of product liability,⁴² the European Court of Justice has clearly pointed in this direction.⁴³ The directive cannot be understood as a minimum harmonization directive. On the contrary, it is in principle a maximum directive. When interpreting its rules one has to apply a comprehensive approach. One part of the rules cannot just be picked out and be the destiny of isolation; they must be understood in the context of the whole directive, with its general aim in mind.

38. When a text for a European tort law is worked out, the result cannot be a compromise between all the national tort laws of Europe. National textbooks and manuals of tort law are not – in or by themselves – able to create a European tort law. The European spirit must be expressed, and with this comes the need for legal integration. When knowledge of the national rules has been obtained a decisive approach to the whole question has to be taken. Some goals of tort law are more important than others. These ultimate goals must be respected and dominate the details. In this procedure, insurance and channeling play very important roles. In the European integration work, channeling is an unbeatable way of harmonizing tort law.

c. Multiple tortfeasors

39. But channeling does not just come from the sky. It must be put into a greater context. The point of departure is that there are two or more tortfeasors (“the multiple case”). This is not the same as if there was only the liability of one tortfeasor brought to the fore (“the single case”).

40. It has been asserted from many quarters in international tort law doctrine that the liability in a “multiple case” is not more than the sum of several “single cases”. Each tortfeasor should be assessed separately (“for himself”), without adopting a comprehensive view. Nothing could be more wrong. When a judge forms an opinion of the liability in a “multiple case” his conception in different respects – for instance concerning causality or negligence – may be influenced by the whole and diverge from what could have come out of a “single case”. Besides the intentional or gross negligent action or omission of A, a slight negligence of B might appear so insignificant that it cannot impose a liability on B (cf. 3 above), whilst in a single case where only the liability of B is brought to the fore, B’s behaviour might lead to liability for him. One cannot without a closer analyze just bring the judgment in a “multiple case” to the situation of a “single case” or inversely.

41. So when there are multiple tortfeasors, one should not restrict the discussion to only concern one of them, without taking into regard the liability of the others. It is not appropriate to just discuss the liability of the employer alone. Also the liability of the employee must be put in the picture.

d. Groups of multiple tortfeasors

42. There are three groups of “multiple cases”. One is characterized by the fact that there is a special *relationship* between the subjects to whom liability might be attached; in this group we find the liability of the employer and the employee. Another group concerns *property* and the liability of the many subjects concerned; one example is the strict liability for damage caused by property. All the other cases can be referred to the third case; here, some authors make a difference between *concerted action* and *occasional co-operation*. Today, it seems as though channeling has its greatest practical importance regarding the first of these groups, the relationship cases.

e. The point of departure: the victim

43. The point of departure for channeling must lie in the *interest of the victim*. Of course it would be possible to discuss a solution where there is a risk that the chances of obtaining compensation are worse for the victim after the channeling than before. There are some situations, such as great nature catastrophes, where such a solution might be accepted because there were so many other favours of the victims connected to a channeling. But under normal conditions channeling must never put the victim in a worse financial situation than before.

44. The most typical form of channeling is therefore to place the final liability on subjects, insurances or special compensation systems that to a large extent are “safe” for the victim, thereby removing one or more liable tortfeasors. The liability must be guaranteed in one way or another. The possibility of achieving channeling depends on the circumstances in each situation. Success does not presuppose dizzy legal changes. As seen, economic channeling, realized by the legislator and including a strict liability placed on a mandatory

⁴² Council Directive 85/374/EEC of 25 July 1985.

⁴³ See the judgments of the Court of 25 april 2002 in the three cases: C 52/00, C 154/00 and C 183/00.

insurance, might be enough. In any event, it will not be possible to eliminate the liability of other tortfeasors until all safety measures are taken..

f. Prevention

45. Channeling is not in itself evident. Everything has its price. Channeling might in some cases violate the idea of accident prevention. But all depends on how the legislation is built up. In the motives of the Swedish legislation, introducing channeling as the instrument for mastering the issue of compensating victims of work injuries, one stressed how the importance of accident prevention could be looked after in the frame of the test of the “particular reasons” test under Chapter 4 Section 1 of the Damages Act.⁴⁴

g. Voluntariness or legislation?

46. It seems clear that channeling based on voluntariness is normally not enough. Legislation must be requested, at least for the long term. This was also a conclusion drawn by the authors of the Swedish legislation regarding channeling in the case of employers’ and employees’ liability. The point of departure when discussing an alleviation of the employer’s liability could have been *against* a reduction of the liability.⁴⁵ The liability insurance of the employer at this time gave the employee a far-reaching protection against claims from the insurer, and the employer bringing claims against the employee for his payments to the victim was considered a rare case. The Minister, however, never accepted an order dependent on the insurers’ practice or of the employer’s discretionary judgment as regarded the issue whether the employee should be deemed responsible or not. “The legislation must”, he stressed, “express what is desirable and appropriate”.⁴⁶

47. However, the will to create a legal rule of reduced liability for the employee was not only considered from the perspective of what seemed appropriate as from the legislator’s point of view. The Minister had to take into account that the employer might not have taken out a liability insurance at all and be insolvent. Two categories of victims were also without protection of the policies: state employees and self insurers. In addition it was stressed that the alleviation of the employee’s liability not only covered damage caused to a third party. It should also cover the direct liability of the employee for property damage caused to the employer. True, property insurance might exist. This, however, was not a certainty.

48. Against this background it is peculiar that the Government authorities later accepted the agreement channeling which was realized through the Industrial Injuries Insurance (see K above). Agreement channeling can be good. But it has to be fair. The Industrial Injuries Insurance does not have this quality. Those who are not employed by an employer connected to the collective agreement on which the insurance is based, are refused compensation from the insurance. Legislation could have prevented this weakness in Swedish compensation law.

h. The future

49. Channeling is a very powerful instrument in developing tort law. The idea can be used regarding all kinds of damage. There seems to be no fields or issues where one can say from the beginning that channeling is excluded. And the effects of this instrument can be highly manifest. Even if liability is only removed from one individual tortfeasor (for instance an employee or an employer), the liberation normally has the effect that a whole collective (employees or the employers) gets correspondingly free from liability.

50. With all deference to the great contribution to labor law given by Reinhold Fahlbeck it has been natural to put the floodlight on the perhaps most important field of channeling in Swedish tort law today: the right to work injury compensation. But of course, channeling has an important role to play also in other domains as well as in the continued development of general tort law.

⁴⁴ Cf. proposition 1972:5 part 1.5.2.

⁴⁵ See to the following: proposition 1972:5 p. 406.

⁴⁶ Proposition 1972:5 p. 406.