TORT LIABILITY AND INSURANCE

BY

IVAR STRAHL

Professor of Criminal Law,
University of Uppsala

1. INTRODUCTION

In early medieval times the law of torts in the Scandinavian countries[1] followed the *compositio* system. The perpetrator of an injury, such as manslaughter or the inflicting of a wound, was obliged to pay a certain sum, a *bot,* to the victim or his relatives. From a modern point of view that sum represented a penalty as well as an indemnity. As a rule, in the cases provided for in the law an injury resulted in an obligation to pay even when the action was accidental. There were detailed tariffs for the *bot:* so much for a life, so much for an arm, etc.

This system of fixed sums for different kinds of injuries existed for a very long time. In Sweden, it was not completely abolished until the introduction of the Penal Code of 1864, which has since been amended many times but is still in force.

However, even in medieval law the injured person was in certain cases entitled to damages in addition to the *bot.* There was in existence a law of torts which was to a certain degree independent of criminal law. Even before the Scandinavian law was recodified during the 17th and 18th centuries, for many cases the law of torts entitled the injured person to an indemnity covering the actual damage, provided the injury had been caused intentionally or with negligence. Not until the 19th century, however, did it become established that in every case where an injury to person or property was caused by the fault of the actor there should be such an indemnity.

No sooner had the fault principle been adopted than the law was influenced by forces which undermined this principle. In-

[1] In this article the term "Scandinavian countries" includes Denmark, Finland, Norway and Sweden. Icelandic law is left aside. Denmark and Norway were for many centuries united under a common king, and the same is true of Finland and Sweden. The common history has made the present laws of the respective countries closely related. Furthermore, since the end of the 19th century there has been in progress a new evolution in the legislation of the four countries tending to unification without, however, any abandonment of the independence of the legislation of each country. On the whole it seems justifiable to regard the Scandinavian countries as one group in comparison with other countries, as far as law is concerned.

dustrialization, and above all the advent of modern means of transport, induced the legislative authorities of the Scandinavian countries to introduce various statutes providing for a responsibility without fault. In Sweden a beginning was made with the Railway Accidents Act, 1886. According to this act, which is still in force, the owner is liable *inter alia* for accidental damage caused by sparks from the locomotive; he is also in other cases responsible for damage caused by the negligence of the railway's employees. It was necessary to legislate here because Swedish law does not acknowledge as a main rule the principle of *respondeat superior* (save in contractual relations), whereas in Denmark and Norway it is an established principle that a master is subject to liability for all injuries caused by the tortious conduct of his servants within the scope of their employment.

Especially important in this context are the Automobile Accidents Acts of the various Scandinavian countries. Of these, the Norwegian statute of 1926 is by far the most advanced in providing for strict liability. According to this act the owner of an automobile is responsible for injuries caused by the vehicle, even if he can prove that the driver has not been negligent. The Danish act of 1932 and the Swedish act of 1916 provide, broadly, that the owner is responsible unless he can prove that there has been no negligence in the driving and no defect in the car. Under all these acts the owner's liability includes injury done to a passenger —in Denmark and Norway, however, only if he is a paying passenger.

As to damage done by an aircraft to persons and property not carried by the plane, strict liability for the owner is provided by statute in all four countries.

Further, strict liability has been stipulated by statutory enactment as regards damage done by high-tension electric current.

The courts in the Scandinavian countries have also changed the law of torts in important respects without any support from the legislators.

Norwegian courts have been the most advanced in recognizing strict liability. In a number of decisions during the last 65 or 70 years they have found the tortfeasor liable irrespective of any fault, for damage caused by an activity creating a characteristic and immediate risk or producing a comparatively great risk for the neighbourhood. It seems nowadays to be a well-settled principle that the tortfeasor is not liable when the damage is considered to be sporadic, occurring seldom and without relation to other

accidents. Conversely the tortfeasor is liable, even without fault, in cases where the damage appears to be an inevitable consequence of a continuous activity or arrangement. In other words, strict liability presupposes a continuous and characteristic risk which, statistically speaking, must in the long run cause damage.

In Denmark the courts have not gone so far in the direction of admitting liability for damage caused by a hazardous enterprise, though it has been said that the Danish law of torts contains a rule of strict liability for extraordinary activities involving a considerable and characteristic risk. Furthermore, the rule of vicarious liability, enacted in the old Danish and Norwegian Codes, is nowadays applied by the courts more frequently than was the case a hundred years ago.

Finnish and Swedish courts have been more cautious in extending liability beyond the fault principle. Lacking a general rule of vicarious liability of the same kind as the Danish and Norwegian ones they have, however, to a certain extent found defendants liable in cases where they certainly would not have been held liable a hundred years ago. In part this is due to the fact that the courts today require a greater amount of care than before. In Sweden, and certainly in Finland also, this refers particularly to activities involving a special risk. The courts are, for example, not inclined to accept the excuse that the defendant has been so busy with other things that he had not sufficient time to supervise the maintenance of materials or the arrangements made, and in this way the entrepreneur is often held liable for a negligence that in fact is not his own but that of his employee. Further, the courts do not always require that the plaintiff shall prove that the injury suffered by him is due to the negligence of a certain person; it is enough that the standard of care required by the court has not been followed and that there is no valid excuse for this. On the other hand the standard required is often not very high; the defendant may be acquitted if the standard which he has maintained is up to the level which is considered sufficient by ordinary decent people acquainted with this sort of activity.

Swedish courts often use the argument that the entrepreneur has by his conduct impliedly warranted that the injured will be indemnified if damage occurs by reason of negligence in his enterprise. This is the case particularly as far as invitees are concerned, e.g. when a customer is injured during his visit to a shop, or a patient during his stay in a hospital.

Judges have adopted a similar doctrine regarding an employer's

liability for injuries suffered by a workman in the course of his employment. According to this doctrine the employer impliedly guarantees to indemnify the employee if he is injured by a negligent act, committed by an employee in a superior position or by a fellow employee who is entrusted with a task of an especially dangerous kind.

As regards non-contractual liability generally, the enterpreneur is held responsible for damage caused by the negligence of an employee in a leading position. The main idea underlying this rule is that the entrepreneur should not escape liability by appointing substitutes to do his own work. Sometimes at least, this reasoning is used to justify the liability of the entrepreneur even for an employee who is in fact only a foreman.

Evidently the danger connected with modern industrial activities is at the root of all these doctrines by which Swedish courts have extended liability. Still, the innovations are by no means confined to modern industry. In principle, the liability is regarded as an extended fault liability or as a vicarious liability. Swedish courts have not, like the Norwegian courts, adopted a general principle of strict liability for dangerous activities. In Sweden such a liability is recognized (outside the scope of the statutes) only in a few special situations, such as damage caused in a military manoeuvre of a very dangerous kind or harm done to neighbours by excavating and blasting in a particularly dangerous way.

Thus, the result of the development of the law of torts in the Scandinavian countries, partly by statutory enactments and partly by judge-made law, is that nowadays there are some instances of a more or less strict liability and that the fault principle has been interpreted in a way that extends the liability to cases where there is no real, or at least no moral, fault.

2. MAIN REASON FOR THE EXTENSION OF TORT LIABILITY. INSURANCE AS A SUBSTITUTE

The main reason why tort liability has been so considerably extended in the course of the last hundred years is clear enough. It is the increased risk of damage, especially of serious personal injury. Both the legislative authorities and the courts have been willing to provide the compensation required by changing the law of torts. In fact, they have been forced to do so. On the one

hand there were the injured, in steadily increasing numbers, on the other hand there were the new activities that caused the injuries. In view of the usefulness to society of these activities it was out of the question to forbid them, but why should not the causers pay damages? Certainly, to hold someone liable for damage did not seem possible without having some sort of justification. Traditionally this justification, as far as the law of torts was concerned, was the existence of a fault. In the light of the new circumstances it seemed necessary to admit that other facts can justify the imposing of liability. In the legislative material of the Swedish statutes amending the law of torts it is repeatedly pleaded that the extension of responsibility is a matter of justice because of the risks involved in the new activities. Stress is also laid on the fact that the extension of liability can have a valuable preventive effect, but the main idea is that of justice, and the main argument, though developed and varied in different ways, is the dangerous character of the new activities.

It is quite natural that the need of compensation should have been met in the first place by the amendment of the law concerning activities producing many and serious injuries. But it does not follow that the law of torts offers the ideal instrument by which the need of compensation can be met. There is another means of doing this, namely by using insurance. As a matter of fact the need of compensation has brought about a new stage in the evolution characterized by a very extensive use of insurance. The task of giving compensation has in practice been taken over, to a very large extent, by insurance.

(*a*) *Industrial injuries insurance*

The juridical development in Sweden as to the treatment of industrial injuries is very illustrative of the trend of preferring insurance to the law of torts. The first act was introduced in 1901. According to this the employer had to indemnify a workman injured during his work by compensation, though on a very modest scale, regardless of fault on the part of the employer or his staff. The idea was that the contract of employment implied an obligation to indemnify the employee. In 1916 this act was replaced by a statute introducing compulsory insurance at the expense of the employers. The main reason for this enactment was to make employees claiming compensation independent of the solvency of their employers. For the employers, too, the compulsory insurance

was considered advantageous, because they were relieved of the risk of having unexpected expenses, perhaps amounting to large sums.

The statute now in force is the Industrial Injuries Act, 1954. According to this statute nearly all employees are insured on a compulsory basis against accidents at work and against occupational diseases. The indemnities are fixed by a scale which follows the wages earned, but they do not entirely cover the lost income. There is also a maximum, in the sense that wage-earnings in excess of a certain amount are not taken into account. The insurance premiums are paid by the employers. The insurance is run by a state agency, but the employer has the option of insuring his employees with a recognized private insurance company.

If the insured is entitled to damages by his employer according to the law of torts, he may sue the employer in court, but his claim will be reduced by the amount of the insurance benefits. The insurer is subrogated into the claim of the injured party against the tortfeasor if the latter has caused the injury intentionally or with gross negligence. The insurer is also entitled to recovery if the accident is due to the driving of an automobile and the injured person is covered by the special liability insurance scheme for motor traffic, and it is only in this last case that the right to subrogation has any practical importance.

In the other Scandinavian countries the problem of compensation for industrial injuries is solved in a similar way. In Norway, however, the insured workman is not entitled to damages from the employer for such loss as exceeds the insurance benefits, unless the employer is found guilty in a criminal action of having caused the injury intentionally or with gross negligence. According to the Danish statute a workman must have special permission from a certain state board in order to be allowed to sue his employer for additional damages.

(*b*) *Compulsory motor traffic insurance*

The law regarding automobile accidents has undergone a similar evolution. As has been pointed out before, there exists in all Scandinavian countries a more or less strict liability in this field of law, but the tort liability has to a great extent been transformed into an obligation to sign a liability insurance contract.

Again the Swedish development is instructive. In 1906, in the early days of the automobile, it was thought advisable to stipulate that the owner of such a vehicle should be liable for injury caused

by the negligence of the driver. A few years later this arrangement was considered insufficient for the protection of the injured. By the Motor Accidents Act, 1916, which is still in force, the burden of proof was placed on the owner. He is held liable unless he can prove that there was no negligence on his own part or the part of his driver (and that the injury was not caused by a defect in the car). As a result the injured has in most cases a right of compensation.

But this arrangement was found unsatisfactory, too, because of the risk of insolvency on the part of the owner. In 1929, therefore, a compulsory insurance scheme was introduced by the Motor Traffic Insurance Act. Unlike the industrial injuries insurance scheme this is not an insurance against personal accidents. Every owner of a motor car, with some exceptions, is obliged to insure with a private insurance company against the risk of being held liable for damages in a traffic accident. It is stipulated that the injured cannot be deprived of his right to the insurance indemnity. The liability of the insurance company is, however, limited to 200,000 Swedish crowns for each person killed or injured, with a maximum of 600,000 crowns in all for such damage caused by the same accident, and to 50,000 Swedish crowns for damage done to property. The owner is therefore obliged to pay the part of the damages that exceeds these amounts, but cases where the insurance indemnity does not cover the entire loss are rare. The insurance company is in its turn entitled to recover the indemnity from the owner or driver only in a few special cases, e.g. when he was intoxicated.

Compulsory liability insurance for automobile accidents exists in Denmark and Finland also. In Norway, the car owner is allowed to give security instead of signing an insurance contract, but very few make use of this possibility.

The industrial work and the use of automobiles are undoubtedly responsible for the overwhelming majority of serious personal injuries. In both these fields, the trend, especially in Sweden, has apparently been the following: at first an extension of the right to compensation on the basis of the law of torts, and later the introduction of compulsory insurance schemes, in fact replacing tort liability to a large extent.

(*c*) *Voluntary insurance*

The voluntary insurance has also developed considerably. Its legal basis consists of the Scandinavian Insurance Contract Acts, dating

from about 1930. These acts were drafted by joint national committees, and as a result the texts are very much the same.

In all Scandinavian countries there is a distinction between, on the one hand, life insurance and certain other branches of insurance and, on the other hand, fire insurance, marine insurance and related branches, which are known as indemnity insurance. When awarding damages to an injured party the court must not, as a rule, take into account life-insurance benefits. Thus the injured party is allowed to take both the insurance compensation and the full amount of damages.[2] The same rule applies to personal accident and sickness insurance except for medical fees and other compensation computed on the basis of the actual expenses of the insured. In indemnity insurances, however, the damages due to the insured are reduced by the amount of the insurance proceeds. This invokes the question of subrogation. Though the insurance proceeds will thus be deduced, subrogation is allowed only to a small extent. The insurance, which is paid for by the injured party, will therefore to a large extent protect the tortfeasor. This effect of the insurance was considered by the joint expert committees which drafted the Scandinavian Insurance Contract Acts and was held desirable, but the idea has been carried out in different ways in the four countries.

In Denmark, the very right of compensation is affected by the existence of an indemnity insurance. It is stipulated that a tort claim founded on negligence less than gross or on the doctrine of vicarious liability may be reduced or nullified. Danish courts freely make use of their power to nullify, especially by eliminating the liability of the master for his servant. To the extent that the liability is not abolished, the insurance company enters into the right of the injured party to the damages.

In the other Scandinavian countries the claim of the injured party is not affected by the mere existence of the insurance, but as soon as that party is paid by the insurance company his claim will be reduced. The injured party has consequently the option of suing the tortfeasor or claiming the indemnity from the insurance company. If he chooses the latter alternative, as is usually the case, the question of the company's right to subrogation arises.

[2] The only exception follows from the general principle of the law of torts that the relatives of a person who has been killed have a right to compensation only in so far as they need it for their support. Consequently, in those cases the insurance compensation is taken into account in the same way as other means at the relatives' disposal.

In spite of this difference in approach the Norwegian act is similar in its effect to the Danish statute. In principle, subrogation is admitted, but the act stipulates that subrogation is not to take place if the liability is founded on a negligence that is less than gross, or on the liability of a master for his servants. If, in the latter case, the damage is caused in commerce or industry the insurance company is, however, always entitled to subrogation.

The Finnish and Swedish acts admit subrogation only where the defendant has caused the damage intentionally or with gross negligence, or "where he is liable at law whether he has caused the damage by negligence or not" (sec. 25). The construction of the text quoted is disputed. However, it is generally accepted that the insurance company is entitled to subrogation against a motor-car owner who is liable for his own presumed fault or that of the driver. The opinion prevails, at least in Sweden, that in most cases where a principal is held liable for negligent acts of his servants there is no subrogation unless the negligence of the servant is gross. On the whole, the Finnish and Swedish acts are applied in such a way that subrogation is rather exceptional save in cases where there are statutory provisions stating a more or less strict liability. The courts are very reluctant to find a negligence gross if to do so will result in the subrogation of an insurance company.

The statutory limitations placed upon subrogation are mandatory in Denmark and Norway. In Sweden and Finland, however, the insurer may demand in his contract a right to subrogation even in those cases where such a right is not granted by the statute, e.g. where the damage is caused by ordinary negligence. The courts also give effect to an express assignment to the insurer of the insured's claim against the tortfeasor. It is interesting to observe, however, that these readily available means of escaping the statutory limitations on subrogation are not generally used by the insurance companies except in marine insurance.

Since the provisions in Finland and Sweden are not mandatory, they give the tortfeasor only a precarious protection. One reason for the limitation of subrogation is, however, the consideration of the interest of the insured. He may not wish to claim damages from the tortfeasor, because the latter is his near relative or his servant. In such a case he would be badly served by the insurance, if, as a result of his collecting the insurance proceeds, the company sued the tortfeasor for the damage.

The fact that the experts who drafted the present Scandinavian

Insurance Contract Acts proposed different solutions demonstrates how difficult it is to settle the question of subrogation. Anyhow, there seems nowadays to be no opposition to the main principle that subrogation ought to be limited in the interest of the tort-feasor. If an amendment of the Swedish act comes to be considered, it is more likely that it will be in the direction of adopting a system similar to the Danish one than in that of granting the companies an unlimited right to subrogation.

3. GENERAL COMPARISON BETWEEN THE USEFULNESS OF TORT LIABILITY AND INSURANCE

The trend of the evolution is evident. Insurance, compulsory or voluntary, has taken over from tort liability most of the task of providing compensation. The reason for this development is obviously that insurance is better adapted than tort liability to perform this task.

A comparison between insurance and tort liability will show that there are some reasons why tort liability, even if vastly extended, cannot possibly provide compensation in all cases where it seems desirable.

The most obvious obstacle is that the law of torts does not assure the injured party the payment of the damages. As a matter of fact it often happens that the defendant refuses to pay either because he cannot afford to do so or because he relies upon the fact that he has no property which can be seized. In many cases it is not advisable for the injured party even to risk the expense of a court action. It must be remembered that the amount of damage caused by the use of modern inventions is often very great. The insufficiency of the law of torts to procure appropriate indemnities becomes evident when one considers having to deal with damage due to the use of nuclear energy.

But there is another reason why the law of torts must remain deficient as a remedy. It is considered unjust to order a man to pay compensation for damage unless there is a sufficient ground to impose on him such an obligation. In tort cases there are two parties, the injured party who claims an indemnity, and the party against whom this claim is directed. There must be some reason why the loss shall not remain on the injured party but be transferred to the other. In other words: the claim of the injured party

for compensation must be compared with the claim of the other party not to be ordered to compensate the damage, and there can be no reason to order the defendant to pay if the former claim is not considered better founded than the latter.

This applies both to fault liability and strict liability. In both cases the loss is transferred from the injured party to a defendant who is held responsible, because he himself or his servants or some other person related to him has caused the damage in a way that makes it seem more reasonable that the loss shall fall on him than that it should be the burden of the injured party.

The problem that arises when considering the possibility of providing indemnities by way of insurance is quite different. The basic purpose of insurance is to spread the economic burden of the damage over all the members of a group. The damage is regarded as an evil and the problem is how to diminish it. This problem is solved by collecting premiums, from which the damage is repaired. Instead of the damage, which from the point of view of the individual is comparatively large and occurs by chance, there is substituted a great number of small premiums that can be calculated.

The question who is going to pay the premiums is a matter for financial consideration. If the compensation of a certain type of damage is looked upon as falling within the sphere of social security, the financing of the insurance is only one of many problems of raising money in order to pay the costs of assuring the welfare of the members of the community. Even if this aspect is not adopted, the premiums need not necessarily be collected from those who in one way or another cause injuries of the type covered by the insurance. In the Scandinavian countries the compulsory motor traffic insurance is run at the expense of the automobile owners, and the industrial injuries insurance is paid for by the employers, and both of these groups can in a sense be regarded as connected with the causation of the damage. But it is also quite possible to let the injured, as a group, compensate themselves by carrying the costs of the insurance. This is the main method followed as far as voluntary indemnity insurance is concerned, provided that there is no subrogation. An argument for this standpoint is that, to a certain extent, the group of the insured is in the long run identical with the group of tortfeasors. In some cases it might be reasonable to choose a mixed system or to use quite another method of raising the necessary money. The Swedish compulsory sickness insurance, for instance, is run at the expense

of the insured, the employers, and the state. To a certain degree it is a matter of expediency by whom the premiums of the insurance shall be paid. The legislator has at his disposal several ways of dealing with the question of financing the insurance; the choice between them is free in the sense that it is not clearly evident that one of them only is correct.

These arguments are set forth in order to show why insurance is superior to tort liability as an instrument for providing compensation. But the purpose of tort liability is not exclusively to compensate the injured. It is generally assumed that tort liability also fulfils the task of preventing injuries by inducing people to take precautionary measures. It has even been argued, especially in Swedish legal writings, that the prevention of injuries ought to be regarded as the most important purpose of the law of torts.

Of course, it is very important to do all that can reasonably be done in order to prevent injuries, and tort liability obviously is to a certain extent a deterrent. This applies to strict liability as well as to fault liability; the very fact that a person is liable even if not negligent himself may induce him to make efforts to avoid causing damage.

But the usefulness of tort liability in this respect must not be exaggerated. Tort liability is not especially well fitted for the task of preventing damages. Because compensation has to be paid only if a damage has been caused, there are many cases of negligence that escape tort liability. Further, damages are not meted out in proportion to the degree of negligence but are calculated to cover the loss of the injured. As has been pointed out previously, it is also a drawback that a great number of wrongdoers live in such economic conditions that there is no possibility of really compensating the injured.

It is worth noting that in Sweden, in fields where a great amount of diligence is required, such as motor traffic, a statutory regulation practically abolishes tort liability. The owner and the driver of an automobile are protected by compulsory liability insurance and need pay damages only in those few cases where the amount of the claim exceeds the liability of the insurer, or in cases where subrogation is admitted. There is no reason to believe that the existence of this insurance has swelled the number of automobile accidents.

It must not be forgotten that there are other inducements to avoid causing injuries. A traffic accident as a rule means that the driver, too, suffers personal injury. Aside from that, there are other

means than tort liability of inducing care, e.g. penal and administrative measures as well as safety measures of various kinds. Finally, the insurance can be administered in such a way that it affords a strong inducement to exercise care, namely by differentiating the premiums. In the spheres of motor traffic insurance and industrial injuries insurance, this method has been used extensively and apparently with good result.

In view of the increasing use of insurance and the diminishing importance of tort liability, and considering the reasons for this trend, it may be questioned whether tort liability is really nowadays an appropriate instrument. One may wonder if the days are not gone when it was suitable to extend tort liability in order to meet the need for compensation. Society has reached a stage of development, economically and socially, where insurance can be used on a large scale. Perhaps insurance ought to be recognized as the proper method of dealing with problems that earlier were dealt with by extending tort liability.

4. THE SCOPE OF TORT LIABILITY IN A MODERN SYSTEM OF INDEMNIFICATION

What has now been said does not mean that we can completely get rid of tort liability by switching over to insurance.

First, a few words about tort liability according to the fault principle. There is much to be said in favour of holding a man liable for the damage he has caused by his own negligence. The argument that has helped more than any other to establish this rule is probably the very simple one that the negligent person has done something wrong, and that the damage for this reason ought to fall upon him rather than be the burden of the injured party. This very simple manner of reasoning will appeal even to the most sophisticated mind because it concerns a practical attitude to future events; even those denying the free will may think it possible to avoid negligence and therefore be able to accept a rule that he who behaves negligently must pay for the damage caused by him.

But this argument is less persuasive when the notion of negligence is extended to include such patterns of behaviour as are difficult to avoid, even for a careful man. It has already been

shown[3] how Swedish courts in cases concerning, for instance, industrial relations have extended the concept of negligence by demanding more than can reasonably be expected by the entrepreneur. The employer may be deemed negligent in cases where the negligence ought rather to be attributed to one of his employees. A technical blunder, perhaps committed by the employer or of his employees when in a hurry, may also be qualified as negligent. It is thus very difficult, in fact almost impossible, even for a careful man to avoid occasionally committing negligent acts. The reason for this extension of the concept of negligence is mainly the desire to provide indemnity for the injured party. The evolution has now gone so far as to produce a need for protection of the person liable, too. This explains the standpoint taken by Scandinavian law as to the limiting of the use of subrogation.

In some fields the law has provided for a more or less strict liability. To abandon the fault principle altogether and adopt exclusively the principle of strict liability is out of the question. For this would mean a liability in tort beyond any reasonable limits. There seems to be no principle other than fault that can be used as a general criterion for tort liability. But it is possible to stipulate that damage originating from a specified cause shall be, regardless of fault, indemnified by someone responsible for the same cause. In this case also it is, however, necessary for the legislator to justify his choice of a solution involving that the loss would be transferred from the injured party to someone else.

It is sometimes argued that from the point of view of social economy it is a sound principle that each enterprise should carry its own costs and that it is for this reason an advantage if the entrepreneur is burdened with strict liability. The argument has considerable weight. But obviously it is not practicable to follow the principle to its ultimate consequences. As a matter of expediency, if for no other reason, it seems necessary to select the enterprises to which the principle should apply, and those who advocate this principle do not indicate how this selection should be done.

Another, very common, view is that he who creates a risk ought to be responsible for the injuries involved. But it is obviously impossible to apply this argument to every risk created. The risk must be in some way qualified. It is said, for instance, that only a risk that is extraordinary and especially great justifies strict

[3] *Supra*, 1.

liability. In Danish legal writing it has been suggested that the law contains a rule of strict liability for extraordinary activities involving a considerable and characteristic risk.[4] The problem of distinguishing considerable risks from other risks is, however, difficult to solve. It does not seem possible to compare all sorts of risks in a scientific way. We must choose the activities with which to compare and as a rule we have no other guide than a rather vague impression that one activity is more dangerous than another. Furthermore, circumstances change as time marches on. An activity may well be looked upon as an especially dangerous one when starting, but within a few years it may become quite an ordinary activity which, though as dangerous as before, cannot be regarded as extraordinary and especially dangerous.

An example of this is offered by motor traffic. In the beginning this traffic was considered especially dangerous, probably in comparison with the means of transportation then habitually used, and that was given as a ground why the automobile owner ought to be responsible even though not negligent. But since those times motor traffic has increased immensely. Probably driving is not less dangerous than in earlier days, but it is no longer an extraordinary activity and the risk involved is one of the most common. It is difficult to contend that a principle of strict liability for extraordinary and especially dangerous activities nowadays should imply strict liability for the owner of an automobile.

Still, the need of indemnities for the injured has evidently not decreased because cars are numerous. On the contrary, the very fact that there are more cars than in earlier days, and that driving a car is no longer something exceptional, is a strong reason why strict liability should be imposed. In Sweden, where the owner of the car is liable as soon as he fails to prove that neither he himself nor his driver has acted negligently, many people are still not content. Pointing to the increase in serious traffic accidents, they demand that the owner shall be held liable in all cases, irrespective of any negligence.

The true significance of the widespread opinion that the fault principle is insufficient when an activity seems to be especially dangerous, is that in these cases the high frequency of injuries draws attention to the need for compensation. Of course, the need of compensation for the individual is not more urgent just because the injuries are frequent, but the very frequency of the injuries increases the need for an extended liability in these cases.

[4] *Supra*, 1.

The purpose of these considerations is to show that it must be doubted whether it is sound to maintain that the dangerous character of an activity justifies strict liability. A general principle of strict liability for dangerous enterprises is very difficult to apply, since it seems impossible to pretend with any assurance that there exists a risk level which ordinary activities do not exceed but which others do. But there may remain good arguments in favour of imposing strict liability for activities that cause numerous injuries, as in this way many indemnities are procured. If this can be done without too much inconvenience for the person liable, there seems to be good reason to do so.

If the activity is of a new kind, it is comparatively easy to justify the burden of strict liability as a condition which must be fulfilled if the activity is to be permitted. Certainly this view was of importance when the extended responsibility for railway, automobile, and aircraft accidents was established. But the novelty of the activity is by no means necessary for making strict liability a condition of the activity. In Sweden, an act was introduced in 1943, providing that the owner of a dog shall be held liable for all injuries caused by the dog. The keeping of dogs is not, of course, a new activity. But certain incidents had drawn attention to the danger represented by dogs and it was found convenient to prescribe that the owner should carry the burden of strict liability.

One objection against this method may be that the person who undertakes the activity exposes himself to a risk of having to pay damages, and that he may be able neither to consider the risk properly nor to bear the consequences if an accident occurs. This objection is important, but it can be refuted if there is an insurance covering the liability. The liability is thus transformed into an obligation to pay the premiums. Instead of being subject to the risk of having to pay heavy damages, the person who undertakes the activity in question needs only to pay a fixed charge. To assume strict liability means, in such a case, that the activity is not allowed unless a charge is paid.

Where strict liability can thus be regarded as a charge, it is much easier to justify it than where its consequences are hazardous. Or at least, if the liability can be considered in this way, it is comparatively easy to compare the need for compensation with the burden laid on the other party, and to judge of the propriety of imposing responsibility. The question whether strict liability is justified then presents itself in fact as a question of imposing charges for the benefit of the victims of the activity.

It is, however, not enough that liability insurance is available, for in most cases the individuals potentially liable would not take into account either the risk involved nor the availability of insurance, and so might neglect to insure. Strict liability without insurance in such a case could be ruinous to the party liable, and of little value to the injured. Perhaps then the rule should be that strict liability ought to be imposed only when the legislator, after having weighed the risks involved against the burden of the premium required, will prescribe that liability insurance should be compulsory. Of course, this does not answer the question of where strict liability should be imposed, but only offers a viewpoint from which the problem may be considered.

In some cases, however, the person or enterprise potentially liable can be said to appreciate both the risk involved and the possibility of insurance, or can be considered as a self insurer. If these persons or enterprises then choose not to insure, they do so in awareness of the consequences. Strict liability might then be imposed against such persons or enterprises without requiring liability insurance.

This approach to the problem of the convenient extension of strict liability is likely to afford a much more certain and a much more practical guide than the rather loose reasoning on the basis of impressions of the degree of dangerousness of different activities.

The evolution of the doctrines adopted by the Norwegian courts illustrates the difficulties connected with the latter method. As has already been said,[5] the Norwegian courts have gone very far in adopting a principle of strict liability for dangerous enterprises. They have, however, experienced great difficulties in stating what exactly is meant by a dangerous enterprise, and after many attempts they have arrived at the definition quoted above, where the important factor is the risk of repeated injuries which can to some extent be calculated statistically. But most risks can be made calculable by taking liability insurance. If there is an insurance company willing to insure the risk, it depends only upon the entrepreneur whether he will insure or not and it is difficult to see why, with the reasoning of the courts, he should not be held liable. Thus, the argument ends in rather absurd consequences.

Approaching the question of the convenient extension of strict liability as has been suggested here, it will be found on the contrary that there are not many activities justifying strict liability. It might be found convenient to apply a more or less strict liability

[5] *Supra*, 1.

to such means of transportation as railways, automobiles and airplanes, and perhaps to some other activities. But the scope of strict liability will be limited. Certainly, it will be found that a need of compensation sufficient to justify compulsory insurance exists principally, yet by no means exclusively, with regard to personal injuries.

5. INSURANCE AS AN INSTRUMENT FOR PROVIDING COMPENSATION FOR PERSONAL INJURIES

We have tried to justify the imposing of strict liability by arguing that a strict liability rule may be advisable where compulsory liability insurance seems convenient or can without disadvantage be dispensed with. It must now be pointed out that as regards personal injuries a compulsory accident insurance is preferable to a compulsory liability insurance.

Compulsory insurance of personal injuries is as a matter of fact used on a large scale in the Scandinavian countries as part of the social insurance scheme. Social insurance is, however, not constructed as a liability insurance. The problem of procuring indemnities is not approached in the same way as in tort liability. This observation points to the assumption that compulsory liability insurance is not an ideal method of coping with the question of procuring compensation for personal injuries. The very nature of these injuries makes another approach preferable. The reason is that the need of appropriate indemnities for personal injuries is very great and that tort liability, even combined with liability insurance, is unable to secure this compensation satisfactorily. This has already been pointed out[6] but deserves further examination.

Before demonstrating the shortcomings of liability insurance in strict liability a few words may, however, be said about insurance against fault liability.

If the liability is one for fault, the injured party gets no indemnity unless the tortfeasor has acted negligently. This is very hard for both the injured party and the insured tortfeasor to understand. They are both inclined to think that there are rather better reasons for indemnity if the conduct of the insured is beyond reproach. It is still more difficult for the injured party to under-

[6] *Supra*, 3.

stand the provision of the Swedish Insurance Contracts Act stipulating that there can be no indemnity if the insured has acted intentionally or with gross negligence. Thus, the injured person gets no indemnity from the insurance either in a case where the insured has acted without any negligence or in a case where he has acted with gross negligence. This result is bewildering to the man in the street, though the idea behind the last provision may seem obvious when looked upon in isolation. In order to avoid the result mentioned it is generally stipulated in the insurance contracts that the injured is entitled to indemnity even if the insured is guilty of gross negligence.

Liability insurance functions better where the liability is a strict one. But even then the connection of the insurance with tort liability is not satisfactory. The Swedish compulsory motor traffic insurance may be taken to illustrate this.

As has already been mentioned,[7] Swedish automobile owners are compelled to insure against liability for damages due to accidents caused by their cars. He is free from liability only if he proves that there was no negligence on his own part or that of his driver (and that the injury was not caused by a defect in the car). Consequently, if the automobile owner succeeds in proving this, the injured party will get no indemnity, either from the owner or from the insurance company.

Cases of this kind are comparatively rare. However, from the point of view of the injured person it is a defect. It should not matter whether the injury was caused negligently or not, as his need for indemnity is equally great in both cases. It is easy to explain why an automobile owner should not be liable where there is no negligence, proved or presumed. But when the liability of the car owner is transformed into an obligation to pay premiums, and consequently the real burden of liability is placed on the insurance company, the injured person is inclined to question the reasonableness of the restriction. Of course the extension of the liability to quite fortuitous cases increases the costs of the insurance. But injured persons are inclined to find it reasonable that the car owners should have to put up with this. If the expense of an extension of the liability is too high it must be questioned whether it is not better generally to reduce the indemnities than to leave a certain number of injuries without any indemnity at all, for reasons that have nothing to do with the need. It seems that the money collected

[7] *Supra*, 2 *b*.

from the car owners in order to protect the victims ought to be distributed in the way that is the most advantageous to the latter. Their preference must be not to take into account where and how the injury was caused but to distribute available money in such a way that each injured person, or at least seriously injured person, can get at least a reasonable indemnity.

For several years there has been a demand in Sweden for an extension of the insurance to cover purely accidental injuries. This demand will certainly in the long run prove irresistible. A growing public opinion regards the standpoint of the present law as untenable.

The fact that the compulsory motor car insurance is a liability insurance is also somewhat inconvenient in regard of the amount of the indemnities. In principle, the insurance company has to pay exactly the amount of damages due. In order to limit the liability of the companies there are, however, some maximum limits stipulated; as has been mentioned above,[8] the company is not obliged to pay more than 200,000 Swedish crowns for injury done to a single individual. Although this limit is fairly high compared with the amounts of compensation usually ordered by Swedish courts, one may object that it favours the old and the slightly injured, because it may not suffice to cover the increased cost of an annuity to a young or wholly disabled person. It may be suggested that it would be a better principle to limit the indemnities according to the income in such a way that lost income above a certain limit would not be compensated. Such a principle is adopted in the Swedish industrial injuries insurance. It may be doubted whether there are good reasons for compelling car owners to pay premiums to maintain injured persons at a high standard of living. It may be left to those who earn a large income to protect their standard of living by taking insurance themselves. Since they cannot foresee whether they will some day be injured by a car or in some other way, they must do this all the same in order to protect themselves. The important thing when instituting a compulsory insurance is to provide for compensation that gives the injured person a decent livelihood.

This argument indicates that there is a way to counterbalance the increased expense of extending the insurance to cover quite fortuitous injuries, viz. by according some benefit to the automobile owner. Since it makes no difference to the victim in what

[8] *Supra*, 2 *b*.

circumstances the injury occurs, it seems reasonable that he should in all cases have to be content with the insurance indemnity and thus abstain from claiming damages from the owner or driver in excess of the insurance indemnity. For the owners it is an advantage not to risk being liable to the excess damages, and for those exposed to the risk of being injured it seems as a rule better to be protected against all automobile accidents than to have a chance of getting, in some situations, damages exceeding the insurance indemnity. In cases where the car is driven recklessly, however, it may be advisable to retain a right for the injured to claim full compensation.

At another point, too, there seem to be good reasons to criticize the construction of the Scandinavian schemes of motor traffic insurance. Since it is a liability insurance, the company has to pay exactly the amount of damages to which the injured is entitled at law, up to the stipulated maximum limits. It follows from the rules concerning the apportionment of damages, as adopted in Scandinavian law, that if the injured person is himself guilty of negligence, his negligence affects the amount of compensation awarded. When a pedestrian has been injured, for example, the law requires that the compensation shall be reduced in a proportion that corresponds to the negligence on the part of the injured party as compared with the proved or presumed negligence of the driver of the car. How this comparison is to be effected is not quite clear, but it is a common practice that the indemnity, if the injured person has been negligent, is reduced to two-thirds, one-half, one-third or some other fraction of the full indemnity. However, the courts generally are inclined to think that negligence by the injured party which is only slight is not reason enough for an apportionment as compared with the proved or presumed negligence on the part of the automobile driver.

This doctrine of comparative negligence is certainly reasonable in ordinary tort cases, where the injured party claims damages from a tortfeasor on the ground that the latter has caused the injury negligently. However, if the indemnity is to be paid not by the tortfeasor but by a compulsory insurance which is run at the expense of all automobile owners, there does not exist the same reason for comparing the faults on each side in every separate case. It should, indeed, make no difference to the insurance company whether a certain car driver in this particular situation has acted with gross negligence, with slight negligence or with a negligence that is only presumed. The important thing from the company's point of view

is to keep the costs down, but whether this is obtained by reducing the indemnity in this particular case or in other cases is of no concern to the company. One can thus question the rationale of applying the doctrine of comparative negligence in cases where the indemnity is to be paid by compulsory insurance.

Further, one can repeat the argument that the money gathered from car owners ought to be distributed in the manner that is the most profitable for the injured: otherwise the money available will not be used in the most efficient way. If this view is adopted, it follows that the question of the degree of negligence on the part of the driver ought not to influence the amount of indemnity. The question of reducing the indemnity ought to be considered only as a question whether the conduct of the injured himself may give sufficient grounds for reducing his indemnity. His conduct is not to be compared with the manner in which the car was driven but is to be judged only on its own merits. But of course all the circumstances in the concrete case, including the manner in which the car was driven, must be taken into consideration when judging the behaviour of the injured.

In view of these arguments it may be suggested that the injured person shall have no indemnity at all if he himself acted with gross negligence. After all, there can hardly be sufficient grounds for instituting a compulsory insurance in order to provide indemnities for people who behave in too disorderly a fashion. Of course gross negligence can be defined in several ways. It may include, for instance, acting under the influence of alcohol. The idea is still the same. People ought not to benefit from the compulsory insurance unless there is reason enough to arrange such an insurance in order to procure indemnity for their injuries. And they should not be entitled to indemnity simply because the tortfeasor has acted with gross negligence, too. The manner in which the car was driven should not matter.

In other cases it is highly desirable that the injured, as a rule, is awarded an indemnity regardless of his negligence. All must agree on the fact that everyone is from time to time guilty of some sort of negligence, and that it is due only to good luck if the negligence has not resulted in an accident. It is undeniable that the average man needs protection by insurance against the risk of being injured as a consequence of his own negligence. As a matter of fact this circumstance is often realized: as has been said above,[9]

[9] *Supra*, 2 *c*.

the ordinary voluntary insurance in Sweden protects the insured against injuries even if these are self-caused, at least when they are not caused by gross negligence. But considering this it is obviously desirable that the compulsory liability insurance instituted in order to protect the people injured by automobile accidents should protect them even against their own negligence. It is not at all to be taken as a matter of course that the negligence of the injured should reduce the indemnity.

It may be objected that entitling the injured party to full indemnity even when he has been negligent may make him less interested in exercising due care. This objection probably does not weigh heavily with respect to the sort of negligence now in view; viz. negligence such as is committed from time to time even by prudent people. If the risk of being killed or mutilated cannot prevent such negligence, it is not likely that the risk of being left without indemnity would have been able to produce this effect.

A more serious objection relates to the costs. However, the importance of providing full indemnities without regard to an average negligence of the injured is so great that one may ask whether it ought not be a condition of having an automobile that the owner shall pay the premiums necessary for insurance providing indemnities to this extent. And the weight of the objection that the costs will be a heavy burden on the car owners, imposed in favour of other categories of the population, is less nowadays when car owners are numerous.

Some means of diminishing the costs have been suggested above. Further, since the problem of covering the expenses of the insurance is a financial one, and the providing for indemnities is a matter of great social importance, it seems reasonable to use public revenues for the purpose or to let the national sickness insurance supply part of the costs.

Summing up these critical remarks on the Swedish compulsory motor traffic insurance, one may doubt whether it is really convenient to construct it as a liability insurance. On the contrary there seem to be good arguments in favour of transforming it into a personal accident insurance.

In fact, it seems to be almost always preferable to construct a compulsory insurance intended to provide compensation for personal injuries as an accident, rather than a liability, insurance. The money collected by way of obligatory premiums ought to be distributed in the manner most favourable to those whom it is

the aim of the insurance to protect, the injured. Their need for compensation depends on the existence of the injury, not on how it has been caused.

The arguments here set forth lead consistently to the conclusion that the method of compensation used in industrial injuries insurance is preferable to that used in motor traffic insurance. But this does not mean that the former type of insurance escapes all criticism. It can be argued, as above with reference to motor traffic insurance, that there is not sufficient reason to permit the injured to claim damages from the employer in excess of the insurance benefits. The fact that the entrepreneur, or someone for whom he is responsible, has caused the damage by negligent conduct does not explain why the injured should have some damages in excess of the insurance benefits. For it should not matter to the injured how the injury is done. If abolishing the liability of the employer can justify an increase of the insurance indemnities, such an arrangement seems to be in the interest of the employees. As to the employers, the exclusion of personal liability is advantageous. To escape possible objections it may, however, be advisable to maintain the liability in tort where the employer personally has acted intentionally or is guilty of gross negligence.

It must be noted that a compulsory motor traffic insurance of the kind here suggested constitutes an insurance against injuries deriving from a certain type of cause, viz. the driving of cars. Industrial injuries insurance, too, is restricted as far as the origin of the injuries is concerned; it covers only injuries caused during the work of the employees or on their way to or from work (and occupational diseases). How is this limitation of scope to be defended against the previously used argument that it should make no difference to the injured when, where and how the injury is caused? The answer is that it has been found feasible to establish, at the expense of car owners and employers, insurances to this extent but not beyond these limits.

As a matter of fact, the arguments used above lead ultimately to a general accident insurance substantially replacing tort liability. The insurance should guarantee all citizens a decent livelihood in case of accident, and there would then be comparatively little scope left for tort liability for personal injuries. The injured person might in a very limited number of cases be entitled to claim damages exceeding the insurance benefits and subrogation would to a certain extent be allowed. But the general accident insurance would be the main instrument for providing indemnity, and the

liability of the tortfeasors, automobile owners, entrepreneurs and so on would in a great measure be transmuted into an obligation to pay premiums. The money necessary to provide the indemnities would mainly be raised by these premiums and by premiums paid by the insured. Since practically all insured are potential tortfeasors this means in some degree a differentiation according to the presumed dangerousness of the activities. But other ways of raising the money could certainly also be tried.

Of course, it will not be easy to create such a scheme. It may even seem Utopian. However, one must remember that the Swedish system is not so very far from the goal. In the two fields where most of the serious accidents occur, compulsory insurance already plays a main part, and the existing general sickness and disability insurances constitute a broad basis.

6. CONCLUSIONS

The aim of the present paper has been to indicate the close connection between tort liability and insurance in modern society and the influence of the insurance on the liability in tort. This influence is important to-day, and it may grow still more important in the future.

The Scandinavian countries are now preparing a reform of the law of torts. As the first step on this path national committees of the Scandinavian countries, working in close co-operation, have prepared reports on a reform of the law regarding automobile accidents. Considerations such as those here presented have to some extent been discussed in these reports.

The main idea underlying the present paper is that it is necessary to get away from the way of thinking characteristic of the law of torts, viz. the comparison between the claim of the injured party and the interest of the other party to escape an order to pay. By means of insurance it is possible to separate the question for what injury the legislator shall provide compensation from the question how to finance the compensation. To some extent this separation has already been carried out in the Scandinavian countries, and it seems desirable to consider the taking of further steps in the same direction. The advantage of this course is that the need of compensation can be met even in cases where there is no tort liability on the side of another party. However,

one must admit that the financing may cause difficulties. Lack of money hampers the efforts to provide compensation, but insurance and similar schemes are undoubtedly better fitted to meet the need for compensation than the law of torts.[1]

[1] An outlook similar to that presented in this paper will be found in the writings of Professor Albert A. Ehrenzweig of the University of California, Berkeley. See especially his "Assurance oblige—a comparative study", in *Law and Contemporary Problems* 15 (1950), pp. 445 ff., and *"Full Aid" Insurance for the Traffic Victim*, Berkeley & Los Angeles, 1954.

The author of this paper is indebted to Mr. George Basye for reading a draft of the study and making valuable suggestions.