THE INDEMNITY LIABILITY OF THE PUBLIC LEGAL ENTITY—PUBLIC-LAW REGULATION WITH PRIVATE-LAW MEANS

BY

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"The doctrine [of adequacy] is, to tell the truth, as slippery as an eel."

Hjalmar Karlgren in *TfR* 1955, p.365.

1. INTRODUCTION

The starting point for describing the system of rules of the Swedish law of damages can probably vary to suit the purpose of the description. Some perhaps consider that the system has in view—or chiefly concerns—principles for the imposition of liability in damages, while others claim that it is more about principles for *delimiting* liability in the law of damages.It is possible—using an expression the present author first encountered in an essay by Gyula Eörsi—to adopt "a working tool view"[1] both to extend and to limit liability in damages. Both juridical argumentation and its tool often lack the exactness that some find desirable for placing them within the respected portals of legal science, and the opportunities of a desired result can thus be grasped in corresponding ways if the choice of argument and working tool is adapted to this. Closer scrutiny of which approach has been chosen gives a good chance of tracing peculiarities in the legal-doctrinal method, irrespective of whether the issue originates in such widely differing subject areas as civil law or criminal law. Even the most established juridical method, perhaps one felt to be self-evident, may be questioned or indeed simply rejected when tradition or legal-political wishes become manifest.

Seeing how the legislator elected to *regulate* the liability of public bodies *legally-technically* in connection with the advent[2] of the Damages Act in 1972, it is easy to read how an attempt has been made to resolve contradictory aspirations[3] through technical solutions intended partly to meet the

[1] See that author's essay "Indirect Damages" in *Festskrift till Jan Hellner*, Stockholm 1984, pp. 253 ff..

[2] For earlier law see SOU 1958:43 *Skadestånd i offentlig verksamhet* (Damages in Public Activity) and on this Hellner, Offentlig och privat skadeståndsrätt (Public and Private Damages Law), in *SvJT* 1960 pp. 641 ff. See also Bengtsson *Skadestånd vid myndighetsutövning I* (Damages in the Exercise of Public Authority) Stockholm 1976 pp. 8 ff.. *Cf.* also Government Bill 1972:5 pp. 243 ff.

[3] *Cf.* here a critical comment by representatives of the public law doctrine, Westberg, *Allmän förvaltningsrätt* (General Administrative Law), 3rd. ed., 1978, p. 192.

need of increased public liability and partly a significant immunity for organs of the state and their activities, not infrequently desired for crass economic reasons. Certain of these limiting rules—*e.g.* the "standard rule" discussed below—have now been abolished but there is still a formal difference between public liability specifically in the exercise of authority and purely private-law liability. The purpose of the present essay is, starting with "the working tool view", to investigate whether there is really a need for *formal* special treatment of public liability or whether, where the circumstances are *really so special* that the damages require a judgement that does not concur with the accepted private-law one, such a judgement can be reached without formal special treatment; to use the "tools" the law of damages offers to examine parallelity and exclusivity in the public-law and private-law regulation, respectively, of liability under the law of damages.

The foremost of this group of working tools is the *doctrine of adequate causality*, which represents the starting point of practically all Scandinavian law-of-damages analysis. Although, or perhaps because, legal writing in the area appears almost unlimited and since the issue touches upon purely philosophical problems, the doctrine has been viewed differently depending on the author and the grounds. Even theoretically pure examples have lacked clarity, and to the extent it has not been a matter of liability in tort for personal injury and property damage, it has often been hard to explain how the doctrine is to be applied in individual cases. It has not infrequently proved to be necessary in some cases to make an exception to the main principle adopted and in others to supplement it with further conditions of liability. In *e.g.* the law of contract, but also when establishing state and municipal liability in cases of exercise of authority, the doctrine of adequacy hardly seems to be an equally self-evident point of departure. Other forms of liability better corresponding to the special circumstances often characterising an individual's subordinate position in the exercise of public authority can be quoted. In addition there remains the question of whether the liability for damages of the state and the municipalities—as part of public law—must perhaps of necessity follow other principles and be guided by other methods than those employed in purely private-law liability.

These problems will be discussed with reference partly to some fairly new cases concerning state liability in the exercise of authority and partly to the novelty it probably represented that Swedish law, through the introduction of the International Sales Act, has possibly accepted the Hadley-Baxendale principle originating in English contract law, a novelty which may also have helped extend the discussion of adequate causality to

the growth of new principles for corresponding limitation of liability in tort.[4]

2. THE LIABILITY OF THE PUBLIC

One of the really important[5] results of the reform of the law of damages that was to lead to the introduction of the 1972 Act on Damages (SkL), was the advent of special regulations on state and municipal liability during what is termed the exercise of authority.[6] Traditional, little-developed Swedish damages law aimed in the 1960s at making the law of personal injury more efficient. It seems nevertheless that one of the most significant current changes affected the issue of state and municipal liability, an issue by no means associated with the primary reform of the law of compensation. In addition, the discussion of state and municipal liability led to a discussion that would hardly otherwise have taken place in Sweden, but which was general on the Continent; the question of liability for pure economic loss. Hence this type of damage, which had hitherto led a rather secluded existence, at least in one special area, now attracted increased interest.

If one considers the practice reflected in the Supreme Court's contribution to legal development during the period since the rules were introduced in 1972, one notes that "citizens"—be they individuals—physical persons—or "enterprises", to an increasing extent make claims upon "the public". Even if the 1972 Damages Act was considered fairly radical on this point, during the 1980s there was much criticism of the design of the system of rules.[7] The criticism seems to have culminated in connection with NJA 1987 p 535, where the state avoided being declared liable in damages even though the National Board for Consumer Policies had damaged a trader by releasing to the press misleading information about the result of an investigation into a number of paint-protection substances.

[4] The principle is expressed in art. 74 of the International Sales Act and goes back to the English case *Hadley* v. *Baxendale*, 9 Ex 341, 156 Eng Rep 145 (1854).

[5] Hjalmar Karlgren, at the time one of Sweden's foremost experts on damages, appears, however, hardly to have seen the Act as particularly radical or innovative. In the introduction to his *Skadeståndsrätt* (The Law of Damages, 5th edn 1972) Karlgren characteristically points out that the Act has not brought "as many remarkable novelties" as—almost understood—one had perhaps expected.

[6] It appears that the original plan was to design special legislation, but the legislator, at a rather late stage in the work, elected to insert the rules on public liability in damages into the general Damages Act.

[7] See on this point most recently Hellner *Lagstiftning inom förmögenhetsrätten* (Legislation in the Law of Property), Stockholm 1990 pp. 124 ff. (The author particularly maintains that the Damages Act is marked "not entirely fortunately" (p. 129) by its own history.)

The Supreme Court found that the Consumer Policies Board had proceeded quite incorrectly "through the misleading way in which the test result was presented in the press release". Since, however, the release had been intended primarily as consumer information and even if this had had any connection with the Board's intervention against the producer and other traders, this, the Court considered, did not represent the exercise of authority. The press release was not even so closely connected with the Board's powers vis-a-vis the groups mentioned "that the incorrect statements can be considered to have been made as part of the exercise of the Board's authority". However, the Court was not unanimous, two justices considering that "the press release [had] implied the exercise of authority in such a way that compensation for pure economic loss can be considered".

The fact that the state avoided liability in damages here attracted attention and upset both politicians and the public, and there has been some increase in liability through changes in the law in 1989. The liability-mitigating "standard rule" in Chap 3 sec 3 of the Damages Act has been abolished, as have two other special provisions that limited state and municipal liability. This was hardly a radical reform[8] but several—larger—reforms have been mentioned.[9] Something so unusual for the reform of central property law as a parliamentary committee has been appointed[10] and there is talk of further demands for more tightening of liability.

The state, through the Attorney-General, often appears to adopt a particularly restrictive attitude to the question of whether compensation shall be payable in the case of damage caused through errors of commission or omission in the exercise of authority, particularly damage caused by misleading information. Bengtsson, for example, considers that while the courts have shown "a tendency to stretch the individual's right to compensation to the uttermost limit which the grounds to the Damages Act and legal practice can possibly grant", the Attorney-General, on the other hand, in his adjustment-of-damages function, has interpreted Chap 3, sec 2 of the Act "somewhat more restrictively than the grounds support". The question of whether the Attorney-General now has support for such a restrictive attitude—at least if the state side in damages-adjustment claims to reflect the law in force—will be discussed below. Two relatively recent decisions show that members of the Supreme Court already appear to have noticed the legislator's signals and introduced stricter liability. The

[8] See Dir 1989:52. *Cf.* Bengtsson in the Foreword to his latest work *"Det allmännas ansvar enligt skadeståndslagen* (Public Liability under the Damages Act), Stockholm 1990.

[9] See previous note and *cf.* Kleineman in *JT* 1989–90 p. 658.

[10] See Dir 1989:52.

model or pattern for these tightened forms of liability is taken from private law, where of course many variants occur.

The principle of a presumptive liability for property taken into custody[11] may be assumed to apply even when the custody in question is part of the exercise of authority though not based upon a contractual undertaking. This may, to quote examples from the grounds to the Act, refer to cases where goods are taken into custody for customs clearance, or are confiscated. The discussion of public liability in this area is considerably older than the rule system of the Damages Act.[12] The question is, however, whether simply assuming a presumption of liability is enough, or whether the liability is strict, or is an intermediate form between strict and presumptive.[13]

That presumptive liability does exist was confirmed in the Supreme Court judgement in NJA 1989, p.191.[14] In connection with a criminal investigation that led to prosecution, a public prosecutor decided that the object of the suspected currency crime—a sailing boat—should be taken in charge pending sequestration. This was done by a district customs office which had the boat laid up in a fenced-off area belonging to a boatyard. The boat was then sequestered until the relevant part of the case was final. When the owner subsequently arranged for the boat to be fetched it turned out that both the boat and certain of the contents and fittings had been damaged, and that certain equipment had disappeared. The owner then made a claim for damages against the enforcement service, but this was dismissed by the Attorney-General. The court of appeal, whose decision was confirmed by the Supreme Court, found that the Damages Act has nothing to say directly "about the state's liability for damage to property taken in charge". There was, however, an older practice supporting

[11] See *e.g.* Hellner, *Speciell avtalsrätt II, Kontrakträtt* (Special Contract Law II, Contract Law), Stockholm 1984 p. 319 ff. The issue was discussed even in the Damages Bill (See Government Bill 1972:5, p. 359). The Minister did not exclude that the liability could be stricter than presumptive in certain cases.

[12] See Government Bill 1972:5, pp. 267 ff., 357 ff. *Cf.* here Grönfors in *Om ansvaret för lossat men icke mottaget gods vid sjötransporter* (On liability for goods transported by sea when unloaded but not received) Publications of Näringslivets Trafikdelegation (The Swedish Industries' Traffic Delagation), Stockholm 1959, pp. 40 ff. *cf.* also Hellner in SvJT 1960, pp. 642 ff.

[13] In Government Bill 1989/90:42 on public liability under the Damages Act, p. 16, the Minister states that since the standard rule was abolished it should be clear that, when assessing public liability, "the argument in the assessment of negligence is similar to that in private-law circumstances". In the case of compulsory taking in charge there is a "special situation containing elements of contract law", the Minister finds, and in such cases there must be no question of mitigating liability in relation to that in private activity; on the contrary, liability should be increased towards strict liability.

[14] See also Bengtsson, *Det allmännas ansvar* ... (Public Liability ...), Stockholm 1990 p.47; also 88 f.

presumptive liability (*e.g.* NJA 1950 p.5) and the court's view was that, had the intention been to break with established practice, this should have been stated "at least in the *travaux préparatoires* to the Act". These, the court went on, gave, rather, the impression that presumptive liability should be considered the main rule; hence the state had to "bear the presumptive liability claimed (by the plaintiff)".

Another feature of the case was the fact that charge had been entrusted to an independent helper. Since this, *i.e.* the boatyard, had had charge of the boat on behalf of the state as part of the state's exercise of authority, the state must be liable for the yard's errors of commission and omission in connection with their charge of the boat. Liability arose since "the state had not shown that the boat had not been damaged in consequence of negligence in care of the same".

The case shows, first, that the state becomes liable for damage when, as here, it has delegated the exercise of authority to a private legal entity.[15] However the value of this case as a precedent is not certain, since the conclusion cannot be drawn that "all faults in commissions of public administration performed outside the official domain should be equated with official errors regardless of whether or not they have been committed in the exercise of authority".[16]

Liability in damages in delegated exercise of authority is a particularly inaccessible problem. According to Chap 3 sec 2, "public" liability refers to "activity for the performance of which the state or a municipality is responsible" and the rule makes no exception for cases where the activity *has been delegated* to a private legal entity. Bertil Bengtsson considers, for example, that the rule expands the liability "beyond what usually applies".[17] That public law liability in damages should be more extensive than the private is justified by Bengtsson with the general legal principle that one is not normally liable for the culpability of enterprises or others to whom one has entrusted the independent performance of certain work.[18] In other

[15] On the state's liability in damages in delegated exercise of authority, see Bengtsson, *op.cit.*, p. 46 f. *Cf.* Lena Marcusson, *Offentlig förvaltning utanför myndighets området* (Public Administration outside the Domain of the Authorities), Uppsala 1989 p. 220 f. and Bengtsson's review of this work in *JT* 1990–91 pp. 337 ff, especially p. 341.

[16] Bengtsson in *JT* 1990–91 p. 341.

[17] See Bengtsson's review of Marcusson, *op.cit.*, in *JT* 1990–91 p. 341.

[18] *JT* 1990–91 p. 341. The new Swedish Sales Act, however, in the obligation to check in its sec 27 para 2, contains firm liability for assistants employed, specially since it deviates from the obligation to check in the legislation on which it is modelled, the International Sales Act. No tendency towards mitigating the liability of employed assistants can be traced in later legislation.

words there would here be a *special regulation* which indicates a risk of an extensive public-body liability. Bengtsson even warns against expanding the liability in delegated exercise of authority since this could tend to become unmanageable.[19]

Following the aims underlying this essay the present author would disagree in some respects with Bengtsson over this issue, since he does not view the rule in Chap 2 sec 2 of the Damages Act as a special regulation of principle for public bodies. In pure private law, the principle is considered to apply that in extra-contractual relationships there is no liability for the negligence of independent traders,[20] but nor is this principle without exception here either. In specified contractual undertakings the supplier of goods is liable, even if he has employed an independent trader, for damage caused by the latter. Another case relevant here concerns what are termed *non-delegable duties*. These generally relate to obligations "imposed through special statute",[21] but it appears that they can also be imposed with the support of general principles of law. From the viewpoint of sources of law, there exist in this area several general principles, of which the main one implies that one is not liable for independent traders, but that if a person, *e.g.* a property owner has a statutory obligation and arranges for another person to perform the duty discharging this, the former cannot avoid liability even if the latter fails to do his part. The present author considers that it should be possible to view the liability of public bodies where the exercise of their authority is delegated as a case of non-delegable duties. A public body has either been formally charged by the state with certain duties, or has itself assumed them. When it subsequently, for varying reasons, determines to cause a private-legal entity to perform a commission, it has not thereby freed itself from its responsibility, since there is a general *private-law* principle that one cannot free oneself from a *non-delegable duty* by causing another to perform it. On this view, judgement of public liability should be the same as *if the public legal entity* itself had performed the commission. If the private-legal subject has acted imprudently, it is normally the authority (or equivalent) that must bear the

[19] Bengtsson, *op.cit.* p. 341.
[20] See *e.g.* Hellner, *Skadeståndsrätt* (The Law of Damages), 4th ed., 1985, p. 118.
[21] Hellner *op.cit.* p. 124.

responsibility.[22] In certain cases the authority's liability may well be judged as stricter than in purely private-legal activity, *e.g.* the use of public-law compulsion. In the latter case there perhaps enters a divergence between purely private-legal liability and public-legal, but this is because of an external circumstance which lacks an equivalent in the sphere of private law.

Note that case NJA 1989 p. 191 analysed above was concluded while the strange "standard rule" was still in force. This rule meant that liability could only arise if "those demands have been set aside which, considering the nature and purpose of the activity, can reasonably be placed upon its performance". Case NJA 1989 p. 607, coming chronologically shortly after the case reported above, indicates that liability is not judged equally strictly if there is no actual taking in charge.[23] In this case a home owner (T) had been arrested in connection with a house search and taken to a police station for interrogation. He had previously, as instructed by the police, left his wallet (a large wrist bag with zip) on a bench in his kitchen. He stated that he during or directly after the search had been robbed of SEK 36,000 kept temporarily in the house. SEK 6,000 had been in the wrist bag

[22] It is problematical whether this liability should be extended to all forms of activity which the state entrusts to private legal entities. Bertil Bengtsson poses the entirely adequate question (*JT* 1990–91 p. 341) of whether, for example, the Swedish Angling and Fishery Preservation Association is in error in supplying certain information entrusted it by the state. This must imply that the state is liable for damage caused by the Association. Plausible though the example may appear, one should not perhaps be surprised into drawing too far-reaching conclusions. Personally, I find it quite reasonable that the state, by delegating an exclusively state task to a private legal entity, does not thus avoid a liability which it could not avoid otherwise. Insofar as the instrumental legal entity may fail in its undertaking, it should probably be held liable in the first instance. From the point of view of the damaged party this statement might be modified so that the state becomes liable jointly with the private legal entity but that the state, should the damaged party elect to bring an action against it, can then regressively claim compensation from the party causing the damage, to the extent that the latter has not through discharge limited his liability in relation to the state, or that the division of responsibility between the damaged party and the party causing the damage is otherwise of a different character from that between the damaged party and the private-legal entity directly causing the damage. Ultimately this liability issue becomes one of who shall bear the credit risk that the private legal entity cannot manage any damages the rules of the law of damages oblige it to pay out. I consider the presumption here should be that the state, which delegated the responsibility, and not the individual damaged by the legal entity to which the state had given an exclusive trust and with which the individual had come into a relationship of dependence, should in the first instance bear this risk. In addition, it is possible that the *causer of the damage* should in some cases be able to avoid liability where the state may be liable, but on the basis of what is stated in this essay (that the difference is not so great between public liability and private-legal entity liability) it appears that the private-legal entity must bear the public liability if there has been a decision to delegate the exercise of authority to private-legal entities.

[23] *Cf.* Bengtsson, *Det allmännas ansvar* (The Liability of Public Bodies), Stockholm 1990, pp. 89 ff.

and SEK 30,000 had been removed from a jacket hanging in a bedroom wardrobe. T claimed that the state was strictly liable in the first instance and in the second instance liable under Chap 3 sec 2 of the Damages Act, since the sum in question had been reached by the perpetrators in consequence of fault and neglect in the exercise of authority, *viz.* in connection with the actual house search. The police had neglected their obligation to guard the property since they had neither ensured that the house was guarded nor allowed T himself to authorise another person to arrange a guard. The state (through the National Police Board) denied that there was any liability in damages in the situation in question. The Court of Appeal, whose judgement was confirmed by the Supreme Court, found no circumstances to show that the policemen had failed in their surveillance of the house, and there was no strict liability either. What emerged in the trial showed, on the contrary, that the police had "had grounds for assuming that" T's acquaintance, to whom T (according to what the Court found proven) had entrusted the house keys, "could likewise be trusted to look after the house". Neither the sum in the wardrobe nor the sum in the wrist bag had disappeared "by reason of any error or neglect by the police which would incur a damages obligation..."

It is hard to see how this case could conflict with the preceding one in any real sense. The crucial point is seen to be that the state in the later case did *not* undertake any duty of surveillance since the damaged party *himself* when taken away by the police handed his house keys to a person the police were justified in considering as one to whom its surveillance could be entrusted. It seems reasonable to require that when someone is arrested the state takes the steps circumstances demand to protect that person's economic interests. Such liability can hardly be described at strict. For this would imply that a citizen who is arrested would enjoy greater protection of property than citizens in general. Certain hazards of normal life are hardly affected by the citizen being arrested by the police. The risk of being exposed to burglary is one the citizen must experience as soon as he leaves his house, and the intervention against the individual in such a case can hardly justify any other course than to arrange for customary supervision of his property. One may wonder what form the liability would take for property which the arrested person actually entrusts to the authority, *e.g.* cash. This would appear precisely to be presumptive liability. The authority will have to show that the person to whom the charge is entrusted is not negligent, regardless of whether this person is the authority itself or only accepted the charge at the authority's instigation. Clearly in a case like this it may be unclear whether there is a genuine charge-taking or merely customary precautionary measures. The issue may here be the

same as when, in the area of purely private law, a line is drawn between taking something in charge and trusteeship which does not concern taking in charge and where, therefore, the issue is only one of normal *culpa* liability. In fact, the *culpa* assessment in such a case probably lies near presumptive liability in that the more elements of trust the trusteeship involves, the stricter the *culpa* assessment becomes. In other respects the question under discussion coincides with the general problem of apportioning the burden of proof. A person who, for example, has undertaken to administer a property during another's absence may have cause to expect to have to produce evidence regarding his routines for supervising the property even if he has no presumptive liability in the ordinary sense. In ordinary *culpa* assessment, the burden of proof is also apportioned according to accepted theories of evidence[24] even where the plaintiff in principle must show that there has been intent or negligence.

The author considers that the above cases show that the difference between purely private-law liability and public liability is by no means great. It is the presence of certain common *damage situations* which contribute to the solutions being sometimes similar, rather than the theoretical similarities between damage in private-law activity and damage caused in or through the exercise of authority.

To examine these reflections further the questions may be tested on a third case concerning the liability of public bodies, NJA 1990 p. 137, which raised the issue of the existence of a liability more qualified than presumptive liability in special cases.

The case concerned whether an enforcement officer's action in changing sequestered money *from* US dollars to Swedish crowns without the approval of the parties affected was such as to render him liable in damages. The value had in fact diminished after the sum had been taken in charge. This was because the Swedish crown had been devalued *after the exchange had taken place*.[25]

An oil company registered in Grand Cayman, West Indies (A) had in autumn 1982 a claim on a refinery (B). When A brought an action against B the Gothenburg District Court determined to sequester a sum of 3,000,000 US dollars (USD), payment for part of a cargo of oil which B had delivered to OK, a Swedish oil company. The Chief Enforcement Officer (C) in Uddevalla executed the sequestration on 28 September 1982. On 30 September C had the money paid into an account with the

[24] See Ekelöf, *Rättegång IV* (The Law of Procedure IV), 5th ed., p. 98.

[25] Another question, though more special, was raised: whether the authority was obliged to make the sequestered sum interest-bearing.

SE-Bank. To obtain better interest than what was offered in USD (10.5%) the sum was changed to Swedish crowns since for the corresponding amount the bank was offering 17.2% interest. Some days after this exchange, however, the Swedish crown was devalued by 16%. When the sequestration was lifted in spring 1983 an amount of just over 20,000,000 Swedish crowns was paid out, of which a certain part was the capital sum and a smaller part interest. A loss had arisen through the exchange and A brought a corresponding claim against the state. The reason why C had the sequestered amount exchanged was that since C was unable to contact A's representative to "obtain instructions as to how the money should be managed", he contacted B's representative instead. This person stated that the higher interest alternative was preferable but at the same time stressed that the decision should be made by A's representative since the money belonged to A. C then decided "on his own initiative" to change the sum into crowns to obtain the higher interest rate. When A's representative learned of the decision, via telephone from the enforcement office, he (as he stated) immediately protested and demanded that the sum be kept in dollars. The enforcement office, for its part, gave as an explanation of the decision to exchange the amount before contacting A's representative that "it was impossible to get hold of him and delay was risky".[26] Nor did A's representative in later contacts with the enforcement office reportedly express any criticism of the way the money was placed.

The Supreme Court found in its judgement that the decision to deal with the capital sum had been a step in the execution of a sequestration order and that the case was therefore "a form of exercise of authority". No contract-law obligations towards the parties in the sequestration had arisen through the step taken; the enforcement officer was bound only by the legal rules of execution. The inference, however, the Court stated, was *not* that the rules of civil law "should lack significance in the connection". It also emerges, for example from the *travaux préparatoires* to the Damages Act, "that certain parallels may need to be drawn with the civil-law rules when judging an authority's actions". The action, however, the Court continues, should first be examined "in the light of the rules on damages applying to public bodies in Chap 3 of the Damages Act". The very absence of special rules on dealing with sequestered money should have indicated that the enforcement office should have proceeded with great caution before arranging the currency exchange. In such situations there is a risk not only of devaluation but also of other exchange-rate changes, and also a risk that costs will arise in connection with the actual exchange. The large

[26] See the District Court decision, p. 5.

size of the sum in question here was another circumstance worthy of consideration. According to the Supreme Court the basis should have been for the enforcement office not to have initiated an exchange "and it shall in any event consult with the parties involved before a decision is made regarding the exchange", and where not all parties consent to the exchange, there should be none. The principle in question here should be departed from "only in purely exceptional cases, for example under very unusual money-market conditions". In the present case the enforcement officer should have postponed the decision to exchange the money until he had "consulted" with A's representative. There was no danger in delay and in view of what emerged from the discussion between the officer and B's representative, a discussion with A's representative was particularly urgent. In addition, the general situation on the money market did not justify an exchange. Although the authority's action in the case was intended to promote the parties' interests in the best possible way, this should not be judged in its own light, but objectively, *i.e.* on its external effect. In the Court's united judgement there was in this case "such a fault for which the state should bear liability in damages" under the Damages Act.

This issue elucidated, the Supreme Court dealt with the state's objection that, even though it should theoretically be under a liability in damages, there could be no liability in this case since there was not adequate causality between the damage arising (caused by the devaluation) and the possible fault committed. The state had claimed that the enforcement office "could not foresee that such an event would occur". It may seem unexpected that the Supreme Court felt moved to raise this subsidiary question since, as noted above, it had already found that there was "such a fault", for which the state ought to be liable. It could of course be maintained that the existence of such a fault should be implicit in the main finding, so that no special decision was necessary on the adequacy issue. However, the Court did not see the matter in this way. On the contrary, it was *explicitly* stated in the Court's reasoning that "devaluation is typically an event of such a special nature that an administrator of money need not normally take it into account". There was nothing in the case, the Court maintained, to indicate that the enforcement office should have considered the risk of devaluation. Since, however, the step of having the sequestered sum exchanged was to be viewed as "erroneous", the authority had "incurred state liability even for unforeseeable damage resulting from the exchange". The state was therefore liable in damages.

As a further piece in the puzzle of different forms of liability affecting state and municipality, the above case is illustrative. The Supreme Court's argument may at first sight appear surprising. Less extensive textbook

presentations usually give as a general condition for liability in damages that it "presupposes adequate causality between the behaviour in question and the damage that occurs".[27] It may be questioned, however, whether the requirement of adequate causality can be considered to be as unconditional as current textbooks seem to show. The very fact that this principle lacks support in law can suffice to admit a certain doubt. While, for example, the *culpa* norm is confirmed by law in Chap 2 sec 1 of the Damages Act, there is no corresponding positive legal support for the requirement of adequate causality. In legal writing, however, supported by legal practice, the more detailed preconditions for adequacy have been thoroughly examined. Its historical roots in German thought from the middle of the last century[28] show not only the close relationship of Swedish private law to German law, but to a larger extent the relativism of the legal principles affected. The necessary limitation of liability, often a chief characteristic of the analysis of damages law[29] is designed differently in different countries, and the English doctrine of foreseeability differs both formally and in substance from the German doctrine of adequacy.

In Swedish damages law, however, two principles that represent more appreciable exceptions to the adequacy requirement seem to have entered practice and gained acceptance in legal writing: the doctrine of *perpetuatio obligationis* and the doctrine of *casus mixtus cum culpa*. The former means, briefly, that where there is delay over the fulfilment of an obligation, the party under obligation must risk his ability to perform being eliminated by some event beyond his control. The only possibility of avoiding liability is then for the obliged party to show that the damage would have ensued even in the case of prompt performance.

The doctrine of *casus mixtus cum culpa* resembles *perpetuatio obligationis* and, likewise, can occur in both contractual and extra-contractual relations. There is liability for accidental damage, but if the party responsible can show that the damage would have occurred irrespective of his action, no damages shall be adjudged.

There is in older Swedish law a thorough discussion of the significance of these doctrines and their relationship to the adequacy and causality line

[27] See Malmström-Agell, *Civilrätt* (Private Law), 13th. ed., Malmö 1990, p. 283, where it also says that the presupposition of liability is normally expressed in the way stated "in legal writing".

[28] See for more detail Honoré, Causation and remoteness of damage in: *Encyclopedia of Comparative Law*, Vol 11, Torts, Ch 7, Tübingen 1983, and Honoré's (with H.L.A.Hart), *Causation in the Law*, 2nd ed., Oxford 1985; also Pezcenik, *Causes and Damages*, Lund 1979, pp. 153 ff.

[29] See *e.g.* Eörsi's interesting point in the earlier-mentioned essay "Indirect Damages" in *Festskrift till Jan Hellner*, (Volume Dedicated to Jan Hellner), Stockholm 1984, pp. 253 ff..

of argument. The present author considers this much characterised by outmoded *Begriffsjurisprudenz* and its incredible ability to establish juridical truths from pure conceptual analyses. While for example Almén and Hult appear to be negative towards other grounds for liability than causality, and even if they perform their respective analyses in different ways,[30] both appear to adopt the classical method; the absence of explicit legal support as a relevant argument for rejecting alternatives.[31] Later authors, however, appear, on the basis of older cases, to have fully accepted these two doctrines as *complements* to the adequacy reasoning.[32]

Through case NJA 1990 p. 137 reported above it appears beyond all doubt[33] that the doctrine of *casus mixtus cum culpa* has been established as a viable route to the solution of intractable liability problems, and thus offered as an alternative to customary adequacy reasoning. Granted, the Supreme Court in its grounds for decision does not mention the doctrine by name; but this can be explained by an inherited view (based on the legal positivism mentioned above) that legal institutions not expressly raised to the status of law hardly need to be named by their "right name" by the courts. This is an order of things which there are good reasons to maintain. The organs of adjudication then avoid the risks associated with being forced to take positions in possible future conceptual battles of the type that so frequently burdens older doctrine.

By so clearly noting that the circumstance that causes the damage, *i.e.* devaluation, is "typically an event of such a special nature that an administrator of money need not normally take it into account..." and, moreover, specially stressing that "in the present case there was no particular reason for the enforcement office to take account of the risk of devaluation..." the Supreme Court has clearly marked that the adequacy analysis alone is not a

[30] See Karlgren in *TfR* 1955 p. 362, with reference to Almén's *Köpslagskommentar* (Commentary on the Sales Act), 3rd ed., Pt. I, p. 211 and Hult's Perpetuatio obligationis (in *Juridisk debatt*, 1952). Lastly, in the last edition of Almén's Commentary... (4th. edn. edited, like 3rd., by Rudolf Eklund, p. 197) it is stated: "For our part we can only find that, in the absence of a provision in positive law, this latter question should be answered in the negative as regards both the sale of specific goods and in delivery agreements." Further: ...the *rule of perpetuatio obligationis* appears to us to be an exception (from the principle of the extension of liability in damages to such effects as have reasonably been possible to calculate), which requires support in positive law." However, Almén points out that other authors (*e.g.* Lassen) have considered that general tenets of law "may be assumed to lead to the same results as the foreign laws", *i.e.* an assumption of the principle of *perpetuatio obligationis*.

[31] *Cf.* Kleineman, *Ren förmögenhetsskada* (Pure Economic Loss), p. 100.

[32] See *e.g.* Håstad, *Den nya köprätten* (The New Law of Sales), 2nd. ed., Uppsala 1990, p. 53; Ramberg in: Hellner-Ramberg, *Speciell avtalsrätt I* (Special Contract Law) Stockholm, 1989, Hellner *Speciell avtalsrätt II*, Stockholm 1984, p. 245 f., and Rodhe, *Obligationsrätt* (The Law of Contracts), Stockholm, 1956 p. 544 f.

[33] *Cf.* Bengtsson, *Det allmännas ansvar* (Public Liability) p. 108 note 3a.

viable route for anyone wishing to place liability for the present damage upon the state. Such an "erroneous" step was taken however, (causing the sequestered money to be changed into Swedish crowns) that "the office has in this way incurred state liability even for such damage ensuing from the change as could not be foreseen." With this formulation light is probably also thrown upon the pronouncement quoted earlier, in which the Supreme Court noted that the matter was certainly one of liability for fault or neglect in the exercise of authority and therefore "in principle [a liability] of a different kind than that incumbent upon a person who has received money in the framework of a contractual agreement ...", but that this does not imply "that principles of private law should entirely lack significance in the context". The doctrine of *casus mixtus cum culpa* may be assumed to be just such a general principle, taken from private law, as can be of use "when adjudicating the actions of authorities...".[34]

The question that arises, therefore, from this case is the extent to which "public liability" is an *exclusive* area of the law within public law, and separate from other liability law with its home in the realm of private law. One almost has the impression of the presence of such an assumption, but somewhat dispersed by present developments in legal practice. Thus Bengtsson stated as early as in 1976 that, for example, in the case of inadequate care of property and the placing of property in the wrong hands, property taken in charge compulsorily, at any rate should "be viewed as a stage in the exercise of authority" and, with support in the *travaux préparatoires* to the Damages Act, he found that public bodies were under strict liability, and that parallels could be drawn "with the contractual liability borne by a person undertaking to store or to transport property". In certain cases Bengtsson could even imagine a parallel precisely with "liability for *casus mixtus* in private law".[35] In the state commission memorandum[36] in which Bengtsson presented proposals for certain raising of public liability in damages, different forms of raised liability were discussed.[37] Bengtsson has later noted[38] that in the bill with proposed amendments to the Act on Damages[39] in close connection with the memorandum mentioned, advocating an *increase in liability e.g.* in the form of presumptive liability or strict liability, which demonstrated that the liability of the au-

[34] *Cf.* here case NJA 1989 p. 191.

[35] See Bengtsson, *Skadestånd vid myndighetsutövning I* (Damages in the Exercise of Authority I), Lund, 1976 p. 326.

[36] Ds 1989:12.

[37] *Op.cit.* p. 61.

[38] See Bengtsson's *Det allmännas ansvar enligt skadeståndslagen* (Public Liability under the Act on Damages), Stockholm 1990, p. 89.

[39] See Government Bill 1989/90:42 p. 16.

thorities coincides with or at least resembles liability in private law.[40]

3. PUBLIC LIABILITY IN RELATION TO LIABILITY IN PRIVATE LAW

The very latest legal development manifested through the cases analysed above seems thought-provoking not only for anyone who wishes to establish the liability in damages of public bodies, but equally for those who wish to go deeper and scrutinise how the law of damages is analysed generally. Public liability in Swedish law is characterised by historical special features. A vague, though often resorted to, notion of *theoretical immunity* for "public bodies" appears to have been the prevailing view preceding the advent of the Damages Act.[41] There were cases that established liability but, in general, support in special legal rules was required before compensation was adjudicated. Even though the special provision (the standard rule mentioned above) has been abolished, public liability continues to seem different, at least superficially. The concept of exercise of authority used as a delimited locution is set against private-law liability. On the subjective side, there is a requirement that "fault or neglect" must be present. This presumably refers "as otherwise under the Damages Act, to the question of indemnity through established (contributory) causation".[42] One immediately wonders why the special locution was in fact chosen, and not the general one in Chap 2 sec 1 of the Damages Act.[43] Appeals experts had proposed the locution "deliberate action or carelessness". The Minister stated that "in agreement with the position I have adopted on the question of general vicarious liability"[44] state and municipal liability should arise "not only on the grounds of anonymous or cumulative faults but also when the causer of the damage can adduce subjective excuses for his objectively culpable action which release him from personal liability in damages. Even

[40] The Bill contains, however, no mention of a case that Bengtsson mentions in the present proposition, *viz.* "when the actual taking in charge has been incorrect but the damage has occurred without carelessness on the part of the authority". See Bengtsson *op.cit.* p. 89 where it is assumed that the reason for this is that there is no question of pure strict liability but precisely of this *casus mixtus* liability. See *op.cit.*, p. 108.

[41] See SOU 1958:43 pp. 133 ff. and Bengtsson *Skadestånd vid myndighetsutövning I* (Damages in the Exercise of Authority I), 1976, pp. 8 ff.

[42] Bengtsson, *op.cit.*, p.178.

[43] "Var och en som uppsåtligen eller av vårdslöshet" (Whoever deliberately or through carelessness...).

[44] The locution "fault and neglect" is also used according to Chap 3 sec 2 Damages Act to delimit the *culpa* assessment when vicarious liability is under discussion.

if it can be shown that an authority has erred in its handling of a matter, it is probably often impossible to establish subjective *culpa* in a given official. Despite this, it ought to be possible to order public bodies to pay out compensation for the damage... Nor can I support the proposal that liability in damages should arise only when the damage has been caused 'deliberately' or through 'carelessness'. In my view a neutral expression must be used which admits of an objective assessment of the course of events which caused the damage."

The Minister's statements may appear as both unexpected and somewhat bizarre. It emerges *on the one hand* that the issue concerns a *culpa* assessment, but *on the other hand* that this assessment is to be made in a way that is presumed to be *uncommon or not customary* and this demands a special legal locution. Why subjective circumstances that were to enable an individual official to be released from *personal liability* should be circumstances to be taken into account when deciding whether the state or a municipality has been careless is something the present author cannot understand. In the same way as the representative of a body, *e.g.* a managing director or a company board member can render himself liable to *organisational culpa*,[45] an authority or a municipality can cause damage to an individual or a company even though it is impossible to apportion personal *culpa* to any individual official. In this respect the reasoning behind the use of a different locution than "cause" (vållande) does not appear all that convincing. It may be added that the *culpa* norm itself is flexible and therefore can (and must) be examined with reference to the damage situation to which it is being applied. If, then, an official commits some error which can be ascribed to the authority neither as *organisational culpa, instructional culpa, supervisory culpa* or other comparable circumstance, then as far as this author can see, the only thing to do is examine the decision as to cause in the light of what can be required of an official in a given situation. If the deficiency is subjective so that the official cannot *on objective grounds* be charged with carelessness, it would appear that the public body cannot be held liable. The locution "fault" (fel) gives no guidance and can to advantage be removed from the wording of the Act.

Another argument for the locution "fault" was mentioned by Bengtsson in 1976, *viz.* that "it is not always sufficient for liability in damages that there should be cause (vållande) on the part of the public body".[46] What is decisive is "*not* how the action has appeared from the point of view of the

[45] *Cf. e.g.* Dotevall, *Skadeståndsansvar för styrelseledamot och verkställande direktör*, (The Liability in Damages of Company Board Members and Managing Directors), 1989 pp. 224. ff.

[46] Bengtsson, *Skadestånd vid myndighetsutövning I* (Damages in the Exercise of Public Authority), 1976, p. 178.

erring official, but whether *the result* of the action deviates from what is correct". Bengtsson also considers that the objective assessment has another "even more important aspect", that subjective circumstances "which could sometimes release the private individual from liability in damages ... according to the grounds for the Act cannot be adduced by a public body". Here are mentioned the case where the official dealing with the matter is new to the work, that the matter is particularly difficult or that the official is ill or worn out by his excessive work load. As the *travaux préparatoires* do, Bengtsson makes a connection with the principles for judging vicarious liability. There too, the locution "fault or neglect" is used for expressing the assessment of cause, for both public and private principals, irrespective of whether the employee has caused the damage in private-law activity or in the exercise of public authority. This author finds the explanation in the grounds of the Act neither convincing or clarifying. The liability of public bodies is in principle a liability incumbent upon a legal person and not a vicarious liability, *i.e. culpa* liability for *damage caused by another person*. It is almost bizarre that the grounds take as their starting point *the subjective motives of physical persons* to avoid liability when discussing public liability. As the commission proposals of 1958 had already established, there may here be liability for both anonymous *culpa* and for cumulative faults. There may further be *culpa in custodiendo vel eligendo / culpa in inspiciendo* and *culpa in instruendo*. There may assuredly be various combinations, variants and accumulations too, among all these grounds for liability. The now-abolished standard rule also expressed, in the present author's opinion, a *culpa* norm which does not lay particular weight upon subjective grounds for release.

Asking whether the requirements have been ignored which, given the nature and purpose of the activity, can reasonably be placed upon its performance appears to lie within the framework of a decision as to whether organisational *culpa* is present, *i.e.* whether the activity should generally have been organised differently and whether this carelessness is per se sufficient to constitute liability in damages. In sum it may be said that the abolition of the standard rule further stresses that there is no need of the locution "fault" (*fel*) in connection with the question of the extent of public liability. That the assessment of *culpa* is influenced by the fact that the issue is about liability on the part of a certain legal person, *viz.* "a public body", appears to be a relevant circumstance, but the problem is not unique to "public bodies" since it recurs wherever the question concerns the liability of a non-physical person.

4. THE DOCTRINE OF NORM PROTECTION AND PUBLIC LIABILITY

The doctrine of protected interest much discussed in Swedish law has recently assumed renewed importance. In case NJA 1976 p.458, Supreme Court Justice Nordenson put forward views indicating that the doctrine of protected interest[47] should be accepted as a *complement* to the doctrine of adequacy. Nordenson's statement in the case under discussion concerned only property damage, but his more detailed legal commentary[48] shows that the argument also bears on pure economic loss in the case of criminal act, at least. The present writer has advocated that the doctrine of protected interest is an important element for limiting liability in damages both in personal injury, property damage and pure economic loss. By "limiting" he refers to a view which, in relation to an imagined principle that all property damage should be indemnified, implies that *some* damage, that is, damage considered to fall outside the protection interest of the norms of action in question, is not indemnified.[49] In relation to the "limitation rule" in Chap 2 sec 4 of the Damages Act, the doctrine of protected interest can also be used to extend liability, so that in cases where damage has occurred without there being a question of a criminal act, compensation *could be paid* willy-nilly. The doctrine of norm protection—as it is also called—has had its detractors and despite the support shown in practice it has earlier, despite its good qualities, not been fully accepted in Swedish law.[50] To this debate must now be ascribed largely a legal-historical interest. The reason for this assumption is the conclusion that can probably be drawn from a recently concluded Supreme Court case: NJA 1991 p. 138.[51]

In this case the Swedish Motor Vehicle Testing Company had failed to discover "a relatively extensive crack at the point where the right drawing bar is fixed to the side member". Because of this crack, "the drawing bar ruptured while driving with the caravan coupled to the towing vehicle, whereupon the body of the caravan was damaged." The Supreme Court found in its grounds for decision that "it was not contested between the

[47] "What's in a name?" In some cases the term doctrine of norm protection is used; in others, "protected interest", protection norm or protection interest. This author has found no appreciable differences between the substantive content of these terms.

[48] Bengtsson, Nordenson, Strömbäck, *Skadestånd* (Damages) 3rd revised edn., Stockholm 1985 p. 45.

[49] This seems fairly well accepted in the other Nordic countries, too. See. *e.g.* Hagstrøm, *Offentligrettslig erstatningsansvar* (Public-law Liability in Damages), Oslo 1987, p. 304 ff. and Saxén, *Adekvans och skada* (Adequacy and Damage), Åbo 1962 p. 2.

[50] See my discussion in *Ren förmögenhetsskada* (Pure Economic Loss), pp. 287 ff, and in *JT* 1989–90, pp. 650 ff.

[51] See the earlier Minister of Justice's restrictive attitude in JK 1981 p. 183.

parties" that the actual damage "had been caused by fault or negligence on the part of the company" and that the case "concerned whether the damage had affected an interest protected by the norm of action that had been disregarded". The Court further stated that the doctrine of protected interest had "not attracted the same interest in Sweden as in other countries"; however there had been some discussion of this in the press, which showed that opinions differed "regarding the need of applying this principle alongside other assessments in the law of damages, including assessments of cause and adequacy".[52] The Supreme Court further pronounced that "the main significance of the principle of protected interest has been considered to lie in questions of pure economic loss". In personal injury and material damage, on the other hand, the principle is "seldom relevant" and this is because "the majority of the norms of action of the *culpa* rules must be assumed to give unqualified protection against any damage of this kind which arises when these norms are overstepped". (Government Bill 1972:5 p. 159). Like the appeal court, the Supreme Court found that the purpose of the obligatory test inspection of motor vehicles must be seen not only to promote "public interest in the whole stock of motor vehicles maintaining an acceptable standard as regards road safety, but also to serve the vehicle owner's own interest in road safety..." In connection with this pronouncement the Court referred to Bill 1963:91 regarding special inspection of motor vehicles.[53] In summary the Supreme Court established that the material damage inflicted upon the person suffering damage "through the company's fault or negligence regarding a part of the caravan that was vital for road safety also negatively affects an interest that is protected by the norm of action the company has disregarded". The conclusion was that the state was liable to pay compensation for the damage arising.

While the decision is limited to *physical damage*, the Supreme Court pronounced that "the principle of protected interest" had had its chief

[52] It was mainly Dufwa who was against the need of a doctrine of protected interest. See his essay in *Festskrift till Sveriges advokatsamfund* (Volume dedicated to the Swedish Bar Association), 1989, pp. 173 ff.

[53] The Supreme Court did not in fact quote this Bill directly, but through the reference to relevant *travaux préparatoires* it is clear that a pronouncement made there appears to have been of significance. In the quoted judgment it is stated "...that such a vehicle check should imply a guarantee for the public that vehicles unacceptable from the point of view of road safety are not driven for longer periods. Even for the individual vehicle owner the check should imply advantages in that he is compelled at least once a year to correct faults that could otherwise have led to traffic accidents". The latter statement appears to imply that it may have crossed the legislator's mind that the vehicle owner, also, obtained certain protection through the check inspection.

importance in pure economic loss.[54] The present author has maintained that in applying Chap 2 sec 4 of the Damages Act, *i.e.* the limitation rule linking liability for pure economic loss to criminal act, one *must* first establish whether the crime in question is really intended to protect the property interests of the person suffering damage.[55] Another question is whether help can be had from the same principle when, over and above the limitation rule, liability for pure economic loss is imposed without there being any crime.[56]

The method of arriving at the answer to the question of what the protected interest of the motor vehicle tests is, must reasonably be the purpose of the analysis. The Supreme Court found in the general considerations shown in the grounds for the present special legislation that the individual vehicle owner's protected interest was also in mind when the owner's duty to have the vehicle regularly inspected was established. This implies that the legislator, when determining the political considerations leading to the advent of the rule, must very carefully weigh up general pronouncements on what "positive effects" or what "spin off" effects the new provision can entail. For such pronouncements can serve as a basis for claims in damages against whoever is to ensure that the protected interest of the rule is complied with. Political smokescreens perhaps laid to put through a rule that would otherwise be hard to justify must be carefully scrutinised, otherwise the state will pay dearly in the form of claims in damages. If one sets up a new control or inspection body one cannot, for example, permit fiscal interests in having greater knowledge of citizen's economic assets—which, alone, perhaps appears an overly brutal reason for the setting up of this body—to "be concealed" by nobler motives such as the community's planning of mobile open-air life or aspects of safety and supervision. On the other hand, should the legislator's worry over the scope of the protected interest lead to the *travaux préparatoires* maintaining silence on this point, the interpreter of the law may not draw any fixed conclusion from this, but would probably be obliged to carry on a free-wheeling legal-political argument seeking support in considerations of

[54] Bengtsson also appears to be of the same opinion. In his *Det allmännas ansvar* (Public Liability) p. 108 he warns the reader about liability situations where the circle of injured/damaged parties may be large, and mentions incorrect information and cases of poor checking as examples of "damage which is both unexpected and remote, yet hardly viewable as inadequate in the accepted sense" (p.111).

[55] See Kleineman, *Ren förmögenhetsskada* (Pure Economic Loss),Stockholm 1987, pp. 278 ff.

[56] That the Supreme Court is prepared to go outside the frameworks set by the "rule of limitations" i Chap 2 sec 4 of the Damages Act is clear from NJA 1987 p. 692. There seems, however, to be no question of applying the principle of protected interest (at least explicitly) in this case.

purpose.

The purpose of the foregoing analysis is to show the need to assert a special norm protection doctrine for certain damage that "cannot on the accepted view be considered as inadequate" but where for reasons of legal policy one is doubtful whether compensation should be paid. The doctrine is of great significance for public liability in damages, but it appears—particularly if one considers the example of damage that can occur—that it is the type of damage rather than the exclusive element of exercise of authority that renders the doctrine relevant to public liability. It seems that public liability is often a form of extra-contractual liability for pure economic loss and that it is the legal-policy issues special to this type of damage that justify the norm protection assessment. With this starting point norm protection emerges rather as a working tool of general damages-law nature, and it does not of itself justify any special regulation for public liability. In this light, the case treated above has more directly established a principle of damages which was first expressed in the case NJA 1982 p. 307 and which gave rise to a discussion of principles to which the Supreme Court has now added further nourishment by explicitly laying down that the norm protection doctrine is a part of our damages-law analysis.

5. THE HADLEY-BAXENDALE PRINCIPLE

Lastly there is reason to bring up a further "working tool" from the damages-law workshop. This is an "implement" which has been somewhat discussed in Swedish law: the Hadley-Baxendale principle. Where it has been noticed at all, the principle has attracted notice only from a narrow contract-law horizon. Bringing it up for discussion in an area which almost entirely concerns torts, and moreover in the context of public liability, demands an explanation. Contractual liability, like public liability, most often concerns property damage and, contractual liability being what it is, the sufferer is often someone who has placed his trust in a party who has gained his confidence. In addition, just as in contractual liability, there is often a point of relevance for assessing the effects of a course of events which has finally led to the damage. The decision to enter the contract can be compared with the point in time at which the authority made its administrative decision.[57]

[57] In some cases, perhaps, the comparison can be made with the point at which the authority ought to have made a decision, but neglected to do so. The corresponding problem exists both in contractual and extra-contractual misrepresentation, in purely private law, namely the point at which neglected action is to be considered as negligent misrepresentation.

The Hadley-Baxendale principle grew out of an English case from the middle of the last century[58] under the influence of French[59] damages law. It was also adopted by American[60] law, and has subsequently influenced other legal systems that have taken over rules from these great legal systems.

One problem when applying the doctrine of adequacy is that even very great resultant damages generally fall within the scope of adequacy and the courts often appear to have been inclined to adjudicate compensation without at the same time applying any particularly strict demand for predictability.[61] While we in "local" Nordic sales law[62] have introduced a strange and particularly complicated rule on liability in cases of "indirect" damage,[63] we have, by incorporating the Convention on International Sales Guarantees (CISG), definitely made the Hadley-Baxendale rule part of Swedish legal thinking.

Purely historically, the rule is typically private-law in nature and since, as noted above, it was developed primarily for contractual pure economic loss, it would seem to give greater guidance in the assessment of damage caused by *misrepresentative behaviour* than does the, to us, better-known doctrine of adequate causality, which indeed, as the start of the analysis, typically appears to have had physically-caused physical damage in view. There is, however, hardly anything to support the thesis that the theories in the true sense should be limited to their respective main areas. For the doctrine of adequacy—the validity of which is not even hinted at in our otherwise particularly abstractly couched Swedish Damages Act—is considered applicable even in contractual relations.[64] Some older Swedish cases, though, indicate that arguments reminiscent of the Hadley-Baxendale principle have long held in Swedish damages-law reasoning.[65] This will be

[58] *Hadley* v. *Baxendale* (1854) 9 Exch. 341.

[59] Code Civil Art. 1150.

[60] Uniform Commercial Code § 2–715(2).

[61] See Hellner *Beräkning och begränsning av skadestånd vid köp* (Calculation and Limitation of Damages following Sale) TfR 1966 p. 313.

[62] So far the "Nordic Sales Act" has been adopted by Sweden, Norway and Finland. Denmark when acceding to the International Sales Law Convention did, like the other Nordic countries, through the "nabo" reservation, reserve the Nordic Sales Act as applicable Danish law in inter-Nordic purchases. At the time of writing, however, Denmark has not completed work on a Danish variant of the proposed Nordic Sales Act (NU 1984:5).

[63] See sec 67 para 2 of the Swedish Sales Act.

[64] *Cf.* here Hellner/Ramberg, *Speciell avtalsrätt I, Köprätt* (Special Contract Law I. Sales Law, Stockholm 1989) p. 221, and Hellner, *Speciell avtalsrätt II, Kontraktsrätt* (Special Contract Law II. The Law of Contract), Stockholm 1984, pp. 324 ff.

[65] The Sales Law Commission (SOU 1976:66) made proposals to this effect, but proposed that "even knowledge which a party acquires after the contract has been entered into can ... affect the amount of compensation payable". See *op.cit.* p. 166 f.; *cf.* also p. 259 f.

further dealt with below.

Let us first analyse the preconditions for liability that may be drawn up on the basis of the case itself. There must be a "natural" or a "normal" consequence of a breach of contract (or as expressed in Hadley-Baxendale "arising naturally, *i.e.*, according to the usual course of things.."). It must further be damage "such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it". The corresponding provision is in art 74 of the CISG and has thus been Swedish law since 1 January 1989.[66] However, the rules are not exactly identical, but it has been hinted in international discussion in connection with the CISG that Anglo-American law could possibly give guidance on the application of the rule.[67] There also appear to be certain differences between the CISG rule and its Anglo-American model.[68] Regarding the realisation of the party that caused the damage, there is no requirement under the CISG that it should in fact comprise the circumstances that could entail the sufferer's losses deviating from what has been described above as "normal". On this basis it appears that the CISG places more extensive liability upon the causer than what the Anglo-American legal rule as developed in practice, does.[69]

The question of whether the Hadley-Baxendale principle (in one of its guises), and which could be divided into further sub-principles, applies in Swedish law outside the scope of CISG has already been adumbrated. Two older legal cases have been adduced in legal writing in support of the idea that a precondition of adequacy related to the Hadley-Baxendale principle already applies in Sweden. The cases are NJA 1913 p. 276 and NJA 1919 p. 486. In the former, the Supreme Court, adjudicating damages, pronounced that the damage inflicted upon the sufferer by the delay "could not be considered to exceed in its extent what [the defendant] should

[66] "[Damages for breach of contract] may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matter of which he then knew or ought to have known, as a possible consequence of the breach of contract".

[67] Hans Stoll states in von Caemmerer/Schlechtriem, *Kommentar zum Einheitlichen UN-Kaufrecht*, p. 619, that "Obwohl die Regel in der englischen und amerikanischen Rechtsprechung entwickelt worden ist, dürfen englische und amerikanische Entscheidungen nicht unkritisch zur Auslegung des Art 74 herangezogen worden".

[68] In Heddle v Baxendale, moreover, the court had referred to articles 1149–51 of the French Code Civil. However, not all the prerequisites for damages stated there were raised.

[69] Both the Hadley-Baxendale rule and art 74 p 2 of the CISG give clear instructions to the Swedish contract maker in future: the increase in information on the background to the contract, the parties' intentions regarding the contract, how the contract fits in with other designs of contract, and so on, are intended to increase the liability in damages of the party in breach of a contract.

reasonably have taken into account when the contract was made...". In the latter case the action in damages was dismissed but the Court minority supported the claim for damages, stating that the defendant "when the contract was made ought reasonably to have considered" and that the plaintiff through the defendant's failure "to arrange documentary credit for the purchase sum could have been rendered unable to fulfil the contract concluded by him for the purchase of the load of aluminium under dispute...". To this Rodhe[70] adds, as the expression of a general principle, that one is "therefore obliged to start with what the debtor 'should have considered' at the moment he entered the contract": regardless of how the adequacy requirement is described, it will, since the point in this case is whether adequacy linked to a breach of contract, be *natural* to select the point when the contract was concluded as the basis of an analysis of what the causer of the damage should have considered. If this point is disregarded and a *later point* is chosen, the liability appears to be particularly limited and the choice of relevant point can become hard. The alternative would perhaps be a purely objectified assessment in which little weight was attached to the individual circumstances influencing, or at least able to influence, the causer. The locution "normal consequences of a breach of contract" seems to be rather a jejune phrase. On this analysis the Hadley-Baxendale rule, perhaps in the CISG version which is somewhat harder on the causer of the damage, seems a suitable starting point for both national Sales Act law and the general contract law. In fact, as a conceivable normal case, such a view might be recommended for Swedish contract law.

It may now be asked whether reasoning related to the Hadley-Baxendale rule can be carried on outside the purely *contractual* area. This concerns primarily such cases as have normally been described in legal writing as "contract-like" or "quasi-contractual" *i.e.* in which pure economic loss figures, often as a result of negligent misrepresentation,[71] but in which the moment of concluding the contract, for natural reasons, is absent. Even in

[70] *Obligationsrätt* (The Law of Contracts), Stockholm 1956, p.306. In older Nordic writing, also, the influence of Anglo-American writing can be traced. Lassen, for example, in *Haandbog i Obligationsretten* (Handbook of the Law of Contracts and Torts), 3rd. partly revised edn., Copenhagen 1917–20 p. 407 that where "da Løftet er den retsstiftende Kjendsgjerning, ikke fordres Erstatning for Tab, som i Kontraktens Øjeblik maatte staa som aldeles usaedvanlige eller unaturlige, selv om de i Ikke-Opfyldelsens Øjeblik vare tydelige nok" (since the promise constitutes the legal act, compensation may not be given for losses, which in the moment of making the contract appeared unusual or improbable, even if at the moment of non-fullfilment they are obvious enough).

[71] The best example of this damage situation hitherto leaving a trace in our book of precedents is NJA 1987 p. 692. In this case, however, the Supreme Court, as distinct from the lower instances, did not use the a contract terminology.

these cases, some form of assessment of adequacy must be resorted to, to keep the extent of the compensation within reasonable bounds. The present author has attempted to describe this issue in another context on the basis of a constructed theory of trust.[72] It would be outside the scope of this essay to do more than note the significance which, in cases of negligent misrepresentation on the part of a person other than a contractual party, is to be accorded to the causer's realisation of the risks of damage associated with reliance upon, for example, a certificate. One can probably require that the issuer of a certificate, at the point of issuance, must have a possibility of assessing what the misleading information may be used for and thus what decisions, or at least types of decision, may be taken in connection with the information given. It is assumed here that this realisation must concern a proximate course of events *or at least one which is foreseeable by the giver of the information*. In American terms, this analytical step has been described as "the end and aim rule"[73] and appears to exhibit common features with the Hadley-Baxendale rule.[74]

On the basis of the present reasoning, it appears appropriate to ask whether the Hadley-Baxendale rule could also be applied in pure economic loss occurring within the scope of "public liability". There are damage situations where misrepresentation may be present, irrespective of whether any true contractual relationship exists. The very contact between the authority and the individual lacks, it is true, the step of concluding a contract, but has other contract-like elements. Through the element of monopoly the private is exclusively referred to the public, which places very far-reaching requirements that the individual shall be able to rely upon work being performed in a proper manner. There is also a *relevant point in time* for assessing the consequences of the action upon which the damages are based, namely that at which the authority makes the decision that causes the damage. There would therefore appear to be good reasons to apply the Hadley-Baxendale rule or an argument of the same kind, in the analysis of public liability as well. The instrument is chosen according to damage situation and type, not to whether the damage was caused by a body in the exercise of its authority or by a purely private legal entity. In this author's view, it becomes what the authority ought to have realised

[72] See Kleineman, *Ren förmögenhetsskada* (Pure Economic Loss), 1987, pp. 417 ff.

[73] See Kleineman *op. cit.* p. 376 ff. *Cf.* Bruce Feldthusen, *Economic Negligence*, Toronto 1984 p. 32.

[74] Bruce Feldthusen has analysed the attitude of the common law system to pure economic loss from a Canadian perspective and in doing so has been more influenced by American material than what his English colleagues, perhaps, usually are. He states, for example (*op. cit.*, p. 120, note 405) that "the remoteness rules in Hadley v. Baxendale ... applied, as they perhaps should be in misrepresentation cases given the close relationship to contract,...".

about the consequences, as regards damages, of its decision or its other action, that will delimit the nature and extent of its liability.

6. THE SALES ACT AND LIABILITY FOR INDIRECT DAMAGE. ANOTHER LEGAL SOURCE FOR ANALOGIES?

It is possible that the reasoning of the previous section might be taken to support the notion that all private-law compensation rules could be directly applicable to issues of public liability for pure economic loss. As will emerge, such an assumption will be rejected: indeed it is suggested that one need not even posit any presumption of the validity of such an assumption.

As opposed to the CISG the new Nordic general Sales Act lacks special provisions relating to the CISG variant (Art. 74) of the Hadley-Baxendale rule.[75] Instead, there is a very remarkable rule on limited liability in what is termed indirect damage. The rule is very hard to interpret and even harder to assess.[76] Since it has no counterpart in the CISG or in the Consumer Sales Act, and is definitely incapable of blending in with the damages rules of the Code of Land Laws, the present author has assumed that it can hardly express any new general standpoint of contract law. Hence it seems natural to assume that indirect damage, which often concerns loss of income in commercial activity, shall not be specially treated when the matter is one of damage caused through fault or negligence in the exercise of public authority. This is underlined by the fact that the earlier special regulation in Chap 3 sec 5 of the Damages Act for cases where the exercise of authority had caused pure economic loss, which in turn had arisen in consequence of intervention in commercial activity, has now been abolished. Under this provision, such damage would be compensated only to the extent this was reasonable "with regard to the type and duration of the intervention, the nature of the fault and negligence and other circumstances". The fact that the special regulation of public bodies has been removed does not support the notion that even stricter special regulation of corresponding type for private law purposes should become the object of any analogous application. It is most remarkable that practically simultaneously with the introduction of a *limitation* on sales-law/contractual liability regarding the sufferer's loss of profits, the limitation of public bodies' liability for the suffer's loss of profits from commercial activity *has been removed*. Underlying the old rule were fears of "economic

[75] *Cf.* above, sec 5.

[76] *Cf.* here Håstad, *Den nya köprätten* (The New Sales Law), 2nd ed., 1990.

consequences for public bodies that were hard to foresee".[77] The Minister stated, referring to the investigator, that the old rule implying that public bodies would avoid paying compensation if there happened to be a profit which the individual had lost, was doubtful legal policy. Precisely this damage, the Minister said, is often the most significant, being "damage which can often have troublesome consequences for continued operations". While the removal of the rule can imply an increase in public costs, particularly municipalities', it was in its then form vague and hard to apply and could easily "create dislike of the authorities and legislation". Some harmony has, however, been achieved with the advantage for public liability in relation to the sales-law regulation that there has been no compulsion to analyse any more closely the locution "indirect damage" to establish when and how a trader's lost profit is to be compensated for. There are certainly cases when his lost profit is found to be outside the scope of the protected interest for the ordinance of any corresponding rule *on the basis of which* the individual has brought his court action.

7. SPECIAL REGULATION THAT IS NEEDED

This investigation has concerned largely an attempt to describe the need to classify problems of damages law otherwise than the legislator has done through the *formal* special regulation for damage caused in the exercise of authority. Actually there is often no real need to analyse the problems arising in connection with the assessment of legal liability in damages in the context of the liability of public bodies, while *at the same time* intractable problems exist that are independent of the accidental placing of the damage in one or another sphere of society. From this angle not even the *necessary* special regulation in Chap 3 secs 7 and 9 of the Damages Act is *in any real sense* a *necessary* special regulation for public bodies. According to sec 7, action may not be brought with respect to decisions by the two highest state bodies or by the Supreme Court, the Supreme Administrative Court or the Social Insurance Court in so far as the decision has not been rescinded or modified. There are several reasons for this. For members of the Government there are special rules in the constitution and it would, as stated in legal writing, "conflict with an important principle of our form of government if it were possible for private persons to have the courts examine whether the Government has acted erroneously".[78] For both the Government and the Riksdag, it has been claimed that examination of

[77] See Government Bill 1989/90:42 p. 21.

[78] Bengtsson et al., *Skadestånd* (Damages), 3rd. ed., 1955, p. 155.

both organs "is anyway freer than that of other authorities and is also influenced by political value judgments".[79] This means that in such cases it could be "difficult" to make a juridical judgment of whether there had been "fault or negligence". To except the three highest legal instances was not justified with the same argument. Here it is stated *e.g.* in the commentary to the Act, that "it is very seldom that these bodies (commit) such errors that the question of compensation can arise" and when "this occasionally happens, it would, particularly in the case of the Supreme Court, be hard to find a suitable instance to try the claim."[80] The arguments hardly seem convincing: especially considering that other upper instances such as the Labour Court and the Housing Court are not mentioned in the legal rule; but on the other hand that there can be "grounds for immunity", meaning that there may be limitations in the right to bring an action regarding the right to compensation for pure economic loss. The need to have sectors free from damages has been touched upon by the present author in his work on pure economic loss as an example of the effect of "immunity factors".[81] There several of these, *e.g.* advice in private life or misrepresentation of the judiciary.[82] The customary immunity that was general in the exercise of authority prior to the advent of the Damages Act probably originated in such notions of immunity. Before the public sector grew to the extent of the modern welfare state, a significant part of the activity took place within or close to the sphere of the central organs of state. The immunity to claims in damages that has developed has, so to speak, an echo in Chap 3 sec 7 of the Damages Act. There seems, however, to be no need for special legal regulation of that case of immunity since there are probably others that would remain unregulated by law. One wonders, moreover, how extensive immunity is. Can one from the fact that the Labour Court and the Housing Court and other comparable organs have not been entered under Chap 3 sec 7 of the Damages Act draw an *e contrario* conclusion? Probably not. On this view Chap 3 sec 7 appears to be an example of a fairly random way of regulating matters, not the expression of some really important and unique exception to an imagined main rule. As to the exception under Chap 3 sec 9, which provides that the state or a municipality does not incur liability in damages under Chap 3 for reasons of fault or negligence in the piloting of shipping, the special regulation is indeed necessary but by no means justified by any special circumstances in public law: quite the reverse! According to sec 233 of the

[79] Bengtsson et a., *op.cit.* p.155.
[80] Bengtsson et a., *op.cit.* p.155.
[81] See *e.g. op. cit.* 513 ff.
[82] See *op. cit.* p. 526.

Maritime Act, a statute which must be considered to belong very closely within the sphere of private law, the company is liable for damage caused by a pilot through fault or negligence while he is piloting. As a rule the pilot is a state or municipal employee, but the liability rule is more marked by a general principle of a shipping company's liability, and also exists abroad, than by notions of the liability of public bodies. Thus the rule expresses a private-law position which there has been reluctance to alter simply because most pilots are public employees. It is the attitude to the activity, regardless of whether it is managed privately or publicly, that has governed the view of the scope of liability in damages. This is a view that should presumably enjoy greater relevance in the future design of rules of damages, than the issue of whether the activity happens to be in the hands of public rather than private legal entities.

8. CONCLUSIONS

It should be evident from this study that in the law of damages there are important similarities between the *damage situations* that may typically arise in contractual relations and those that can follow from a private citizen being obliged to apply to a public body to obtain advice or a decision.

In case NJA 1990 p. 705 the resemblance between the contractual damage situation and that of a private citizen obtaining advice from an authority is further stressed.

In this case a municipal health inspector (H) had in a letter to a house owner (O) quite erroneously stated that the latter's property was a private nuisance since it had a "radon content" that exceeded a certain limit. H recommended that O should have a heat recirculation system installed. O followed this recommendation but further examination showed that O's property did not exceed the limit at all. O then claimed compensation for the cost of the installation. The municipality disputed liability, claiming that there could be no question of damage caused in the exercise of authority, but this was a part of the service it supplied. The public health committee decision communicated to O had simply been intended to enable the property owner affected to obtain a state loan to remove the risk of radiation, and was a normal decision without legal effect regarding private persons. In addition, the mistake made was excusable and anyway O had suffered no damage. The installation was justifiable from a health point of view even with the correct measurement values and had, in addition, raised the value of the property. O disputed the correctness of

these latter two assertions. Both the District Court and the Appeals Court found that neither the decision taken by the public health committee (not a part of the committee's exercise of authority but merely a decision of principle establishing a radon content limit value above which a property was to be considered a "private nuisance" and therefore without direct legal effects for a private person) nor H's letter to O (containing a recommendation only, offered without statutory obligation) constituted exercise of authority; nor were they so closely connected to a committee matter that they had to be viewed as having been issued as manifestations of the exercise of authority.[83]

The Supreme Court found that while H's letter indeed contained what was only a recommendation from the committee, it was intended to give O the opinion "that he was obliged to take steps to lower the radon content and that the committee could otherwise conceivably intervene with an injunction or a prohibition". Furthermore, the committee possessed this prerogative and even had it not intended to intervene with coercion, "the erroneous information must be considered to have been supplied in the exercise of authority". Nor was the fault excusable since H in the letter expressed himself in a very firm manner without reservation, and since there is, further, no reason to assume that O would have installed the system "if he had not been misled by the letter" and since it was not shown that the installation had brought him any economic advantage, the plaintiff's case was upheld.

In its comments on the proposed 1989/90 amendments to the Damages Act, the Board of Uppsala University's Juridical Faculty[84] stated that this parallelity meant that the individual suffering damage through the exercise of authority should not have a poorer legal position than he would in a contractual relationship. The present author has wished to go a step further. Through investigating the working tools used in different damage situations it seems that one can demonstrate that they are often similar, basically because the damage situations themselves have so much in common. The problem in the exercise of authority is that the contact between the causer of the damage and the sufferer is not always so *clear* as in contractual relationships. This problem divides public bodies, however, as appears to have emerged above, with some activities of a private-law sphere not being carried on within the framework of a "true" or "real"

[83] One appeals court justice, however, was of a different view. He stated, with support from the *travaux préparatoires* to the Act and statements in legal writing, that the committee's decision *together with* H's letter, represented a manifestation of the committee's exercise of authority.

[84] See Government Bill 1989/90:42 p. 54.

contractual relationship. In this context another factor instead emerges in the private-law sphere—the type of the damage—as a uniting ground for assessment. The liability for pure economic loss in extra-contractual relations has always been treated specially in Swedish law. This is not unique to Swedish law, but occurs in other legal orders too,[85] although the Swedish view has been more categorical and formalistic than that in most other legal orders. It seems as if the Supreme Court, through case NJA 1987 p. 692[86] has started to soften up the earlier rigid link with requirements as to criminal act. This development is absolutely necessary, but it is important at the same time not to allow things to go so far that one equates physically caused physical damage with pure economic loss. This was done until the middle of the 1980s in English law, but the fear of extending liability in damages to American proportions has led to a more cautious stance.[87] For judgment in these cases, however, the circumstances of the actual damage situation will have greater importance than if the causer were a public body or a private legal entity. The unclear link between the requirement for the element of exercise of authority and the damage, manifested in the locution "in" or else "in connection with" the exercise of authority implies that too sharp a demarcation between pure economic loss caused "in" or else "in connection with" the exercise of authority would entail an immunity conditioned by random factors. It would then indeed be possible to extend the public bodies' liability for pure economic loss on private-law grounds, *i.e.* the Supreme Court's clear rejection (NJA 1987 p. 692) of the possibilities of an *e contrario* termination from the "limitation rule" in Chap 2 sec 4 of the Damages Act. If however public bodies, like private-law entities, can be liable for pure economic loss in extra-contractual relations, which appears entirely reasonable, this should also support the abolition of the special regulation in Chap 3 sec 2. Actually the special regulation seems to be governed by an implicit notion of a non-liability existing over and above Chap 2 sec 4 of the Damages Act (*i.e.* over and above the cases in which the causer of the damage has acted criminally). Since this notion is

[85] See Kleineman, *Ren förmögenhetsskada* (Pure Economic Loss), 1984, pp. 323 ff.

[86] *Cf.* for the background to this case Kleineman, *op.cit.*, pp. 542 ff.

[87] *Cf.* the latest development in English law after the House of Lords' decision in *Murphy* v. *Brentwood DC* (1990) [2] W.L.R. 414 and the discussion in English legal writing, *e.g.* Duncan Wallace, Ann beyond Repair in *Law Quarterly Review*, 1991, p. 228 ff, plus in the same journal 249 ff. Jane Stapleton, Duty of Care and economic Loss: a wider Agenda. While the development towards increasingly unlimited liability seems to have got out of hand in the United States, it has been possible in English law to discern, following a continuous expansion of liability from the mid-1960s, a more restrictive stance from around the mid-1980s. The more balanced English view on how far liability should be extended would in my view be a more suitable starting point for Swedish law than is the untrammelled American development in which the sufferer's interest seems to override most other social interests.

incorrect, retention of the special regulation increases the risks of the courts' drawing unintentional *e contrario* conclusions regarding liability when there is uncertainty as to whether the damage was caused "in" the exercise of authority. If on the other hand liability is incurred in other "looser" connections with the exercise of authority, *i.e.* over and above Chap 3 sec 2 of the Act, the special regulation now seems to be an unexpected main rule that liability "in general" shall *only* be incurred regarding damage arising "in" such exercise. A change like this could lead to random differences between public liability and liability in other spheres of activity. The only remaining argument for retaining a special regulation would then be the need to retain the locution "fault or negligence" so as to mark that the assessment would be undertaken more objectively than otherwise. As developed above, this argument cannot be accepted either. Even in purely private-law activity, the assessment must be undertaken objectively when the matter concerns the liability in damages of a legal person. In actual fact the same assessments can also be found in this area too, irrespective of whether they concern public or private activity. In both private-law legal persons and the assessment of liability of public-law legal persons, it is in certain cases necessary to disregard subjective grounds for discharge from liability. State and municipal liability according to Chap 3 sec 2 of the Damages Act is not vicarious; it is *a corporate liability*[88] and as such can include cases of cumulative *culpa*, anonymous *culpa* and other cases of *own negligence*. Since corporate liability in private law has not been considered to give rise to a need to express the *culpa* judgment in special terminology, such expression in the special case of corporate liability which public liability represents, should be abstained from.

In his study *On Fragmentation in Civil Law* in this volume, Bertil Bengtsson warns against the effects of the increasingly fragmented picture civil law is exhibiting, largely through the present intensification of legislation. It is not hard to share Bengtsson's position that as an elementary "minimum requirement of legal technique, the same legal principle must be used in similar cases". With this starting point it may be hoped that corporate liability for legal persons based on an objectivized assessment of *culpa* is expressed similarly, irrespective of whether the damage has been caused by entities governed by public law or by private law, if one thinks that the assessment shall *in principle* be similar in similar cases. As to the extent of the liability, this is often extra-contractual if the damage has been caused by a public-law entity and contractual if by a private-law entity. But

[88] That state and municipality have in addition a principal liability as employers is a different matter outside the scope of the present discussion.

since *the relation* between the causer of damage and the sufferer largely resembles a contractual relationship when a private citizen is seeking contact with state and municipality (as for example in NJA 1990 p. 705 touched upon above), there is no decisive reason for not also allowing the liability for pure economic loss in the contractual relationship, *i.e.* the *culpa* norm, to form the point of departure for public liability for pure economic loss. Since, however, there may be cases where the relationship between causer and sufferer of damage may be more markedly extra-contractual, assessment in such cases should tally with that in other cases of extra-contractual pure economic loss. This leads to the conclusion that the issue of liability for public bodies should not be specially regulated by law. Instead, the legislator should retain the *culpa* norm of Chap 2 sec 1 of the Damages Act and as a result of the proposed deregulation consider a different formulation of the "limitation rule" of Chap 2 sec 4 of the Act. The present author has discussed this elsewhere and made two suggestions.[89] One possibility would be to abandon the whole legal rule, thus handing over the issue to court practice which, without offensive *e contrario* conclusions,[90] might decide whether an organ exercising authority—like other causers of damage—should bear a liability for any pure economic loss it caused. The other possibility would be to list a number of circumstances in which liability for pure economic loss would be incurred and there specify, for example, exercise of authority of contract-like character (*e.g.* the particularly qualified counselling that occurred in NJA 1990 p. 705 and which was understood by the individual concerned as almost mandatory in character).

The present author has previously advocated deregulation so that the issue might develop entirely freely through court practice. Such development has actually long been in progress regarding Chap 3 sec 2 of the Damages Act and could surely be completed even though both this piece of legislation and Chap 2 sec 4 of the Act may possibly be abolished as a result of the damages committee now sitting. A more "appropriate" alternative would perhaps be, in view of the Supreme Court's fairly clear pronouncements in NJA 1991 p. 138 regarding material damage, to abolish Chap 3 sec 2 and at the same time create a new text in Chap 2 sec 4 establishing as a general principle that personal injury, material property damage and

[89] See *Ren förmögenhetsskada* (Pure Economic Loss), p. 576 f.

[90] Thus NJA 1987 p. 535 where even the representative of the winning party, the Minister of Justice, in his opinion on the bill referred to him, stated that the outcome of the case "may appear unsatisfactory as to the private party's interest." See Government Bill 1989/90:42 p. 51. It should be an *absolute demand* that the outcome of a damages action may not be unsatisfactory because of the design of the substantive damages rules.

pure economic loss be compensated for only if there has been economic damage through harm to an interest which a given legal rule is intended to protect. If on the other hand there should be an expansion of the authorities' information liability towards the public for information given in connection with contact between authority and individual or for the contents of information publications (which is not far from the view the Supreme Court has already adopted through the outcome of NJA 1990 s. 705), and if this expansion should be brought about by choosing a "looser" locution than the expression "in the exercise of authority", little, in this author's opinion, would be gained. Even if the damage-suffering public, misled by negligent information from public officials, is in great need of protection, the liability can hardly be extended to include *all damage* caused by *all conceivable* dissemination of information. Theoretically, the principles of liability for information should not be more far-reaching than what corresponds to the information liability in contractual or contract-like circumstances. In fact the very content of the locution "contract-like relationship" appears to constitute the real limitation of the private-law information liability. For public bodies to bear a complete advisory or publicational liability could involve them in unlimited and very costly information liability. The present author considers that in this area, as in purely private law, the limits of information liability should be sought in an assessment of what constitutes *the sufferer's justifiable trust*. This is fully in line with the Supreme Court's grounds in NJA 1990 p. 705 where it was found that the letter which purely objectively was to be read as advice "was intended to give [the sufferer] the idea" that an obligation had been laid upon him. The effects of the damage-through-information were here assessed on the basis of how the sufferer had been led to understand the information.

By confining oneself to supplying the norm protection rule described above in the form of legal text, one *compels* the adjudicating organs, through court practice, to decide how far the liability for erroneous advice and other misleading information should extend. If on the other hand one elects to limit the reform to information issued by public bodies, using a looser locution such as "in connection with the exercise of authority", little is gained. Instead of compelling the profession to undertake a legal-political discussion of what distinguishes cases giving grounds for liability from those where no liability is present, one buries such discussion in a fairly meaningless concept-building that counteracts any clarifying changes in the law.